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1877.

THE  
ONTARIO LAW REPORTS.

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CASES DETERMINED IN THE COURT OF APPEAL  
AND IN THE HIGH COURT OF JUSTICE  
FOR ONTARIO.

1902.

REPORTED UNDER THE AUTHORITY OF THE  
LAW SOCIETY OF UPPER CANADA.

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JUDGES  
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DURING THE PERIOD OF THESE REPORTS.

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JUDGES  
OF THE  
HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

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“ WILLIAM LOUNT, J.



## MEMORANDUM.

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On the 20th March, 1902, the Honourable JAMES THOMPSON GARROW, one of His Majesty's Counsel, was appointed a Justice of Appeal.

## ERRATA.

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Page 72, line 7 from bottom—For “no difference” read “a difference.”

Page 165, head lines—For “ch. 146” read “ch. 106.”

Page 356, head note, last line—For “483” read “413.”

Page 564, line 12 from bottom—For “that effect” read “that fact.”

Page 664, head lines—For “52 Vict.” read “62 Vict.”

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# REPORTS OF CASES

DETERMINED IN THE

## COURT OF APPEAL

AND IN THE

## HIGH COURT OF JUSTICE FOR ONTARIO.

[DIVISIONAL COURT.]

RE R. L. JOHNSTON, A SOLICITOR.

D. C.

1901

*Solicitor—Solicitor and Client—Taxation—Allowance of Lump Sum—Work done out of Court—Power of Taxing Officer.*

Nov. 6

A solicitor employed to collect claims aggregating \$82,000 from eleven different insurance companies, of which payment was resisted on the ground that they were gambling policies, while the widow of the insured set up a trust for herself and her family, subject only to a lien for premiums paid and interest, after long negotiations collected from nine of the companies in all \$70,000 without suit, and also compromised the widow's claim leaving \$60,000 to his client, who by another solicitor then took legal proceedings on the remaining policies which were unsuccessful. The former solicitor rendered a bill showing in detail the negotiations and charging disbursements and ordinary costs in connection with an action by the widow and for drawing claim papers and affidavits, and a further lump sum to cover the negotiations out of Court. The client obtained an *ex parte* order referring the bill to taxation, and the taxing officer allowed \$3,200 in respect to the lump sum charged having first with the acquiescence of the parties conferred with various referees, officers and members of the profession as to charges usually made in such matters and then determined the amount to be allowed in the light of his own general knowledge and experience:—

*Held*, that the ruling of the taxing officer should be affirmed; and that after himself issuing the order for taxation the client could not claim to have the solicitor's remuneration assessed in an action.

*In re Attorneys* (1876), 26 C.P. 495 followed.

GEORGE BROPHY effected insurance upon the life of Alexander Cromar in eleven different insurance companies for sums aggregating \$82,000, and paid the premiums upon these policies for a number of years when Cromar died. The insurance companies contended that under the circumstances the policies were void

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1901

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JOHNSTON,  
A SOLICITOR.

as gaming policies; while the widow of Cromar contended that the insurance was intended to be a trust for her and the family of the deceased, subject only to a lien in favour of Brophy for premiums actually paid and interest. Brophy, however, retained a solicitor, Mr. R. L. Johnston, and instructed him to prepare the necessary proof papers and endeavour to collect the insurance moneys. The solicitor, after advising the client of the difficulties in his way, proved the claims and entered upon negotiations with the companies, which resulted in nine of the eleven companies being induced voluntarily to pay the full amount of their respective policies, and upwards of \$70,000 was so collected. The solicitor also undertook negotiations with Mrs. Cromar, which resulted in the abandonment of her claim in consideration of payment to her of a proportionate amount, leaving upwards of \$60,000 net for his client. The client thereafter placed the matter of the remaining two policies in the hands of another solicitor who took legal proceedings, but the attempt to collect was unsuccessful. Mr. Johnston rendered a bill to his client shewing in detail the negotiations conducted by him, and charging his full disbursements and ordinary costs in connection with the action commenced by Mrs. Cromar, and with the drawing of the claim papers and the affidavits in connection therewith, and charging a lump sum to cover all the services rendered by him in the negotiations out of Court. These negotiations extended over a period of about seven months, and the detailed bill covered about 150 folios. The client obtained on October 1st, 1901, an *ex parte* order in the usual form referring the bill to the senior taxing officer at Toronto for taxation. The taxing officer ruled that the principle upon which the bill had been made out was correct and that the solicitor was entitled to receive a *quantum meruit* for the services for which a lump charge had been made; and it was suggested that instead of expert evidence as to the quantum proper to be allowed being given the taxing officer should himself interview various referees and officers accustomed to deal with similar matters and members of the profession whose opinion he thought would be most valuable as a guide to ascertain the charges usually made in matters of this kind, and should then determine the matter in the light of his own



general knowledge and experience. The taxation stood over to allow such enquiries to be made, and the taxing officer, after such consultation, allowed a fee of \$3,200 to cover all the items included in the lump charges, and certified the total bill at \$3,323.19. From this certificate the client appealed.

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The appeal came on for hearing before BOYD, C., on November 5th, 1901.

*Daniel O'Connell*, for the appeal.

*W. E. Middleton*, for the solicitor.

November 6th. BOYD, C.:—Having regard to *In re Richardson* (1870), 3 Ch. Ch. 144, and the line of practice founded thereon as manifested in the certificate of the taxing officer appended to *In re Attorneys* (1876), 26 C.P. 495, I do not disturb the conclusion of the taxing officer.

The circumstances surrounding the professional employment in this case were very exceptional and justified the somewhat liberal allowance ascertained upon the reference. The appeal is dismissed with costs.

The client then appealed to the Divisional Court, and the appeal was argued on December 11th, 1901, before FALCONBRIDGE, C.J.K.B., and STREET, J.

*D. O'Connell*, for the appellant, contended that the tariff did not recognize any such item as the lump sum charged; that in *In re Attorneys*, 26 C.P. 495, both solicitor and client seem to have acquiesced in what was done; that there is no jurisdiction in the taxing officer to tax anything at all for work not done in Court, or in Judges to regulate such charges; that obtaining the order of reference did not preclude the client objecting to the taxing officer's jurisdiction to deal with the item in question: *In re Parker* (1882), 21 Ch. D. 408; that *In re Richardson*, 3 Ch. Ch. 144, proceeded on the ground that it was too late to take objection for the first time on an appeal; that a proper assessment in an action of the value of the work done should have been had, and proper evidence required; and that even if the taxing officer could properly allow something the Court would see whether he had exercised his discretion properly: *Ostrom v. Benjamin* (1893), 20 A.R. 336; *In re Jones* (1872),

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L.R. 13 Eq. 336; *Re McBrady and O'Connor* (1899), 19 P.R. 37; *O'Connor v. Gemmill* (1897), 29 O.R. 47; *Paradis v. Bosse* (1892), 21 S.C.R. 419; *In re, J. R. Jones* (1857), 3 C.L.J.Q.S. 167.

*Middleton*, for the solicitor, was not called on.

*Per Curiam.* The appeal should be dismissed for the reasons given by the learned Chancellor; *In re Attorneys*, 26 C.P. 495, completely covers the case; and the contention that the client is entitled to have the solicitor's remuneration assessed in an action must be disregarded as he had himself selected the forum by issuing the order for taxation.\*

A. H. F. L.

\* Leave to appeal to the Court of Appeal was refused by Lister, J.A., on December 31st, 1901.—Rep.

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[IN THE COURT OF APPEAL.]

LANGLEY V. VAN ALLEN.

C. A.

1901

Sept. 21.

*Bankruptcy and Insolvency—Assignments and Preferences—Extension Agreement—Secret Advantage—Voluntary Payment.*

The defendant, whilst entering with other creditors into an extension agreement, took from the debtor, without the knowledge of the other creditors, notes at short dates for a large portion of his claim in favour of his nominee. These notes the debtor paid at maturity, and shortly afterwards made an assignment for the benefit of his creditors, the general extension payments not having been met:—

*Held*, that the payments so made were voluntary payments and that the other parties to the extension agreement, suing in their own names, and in the name of an assignee under an order, could not recover from the defendant the amount of the payments.

Judgment of Boyd, C., 32 O.R. 216, affirmed, ARMOUR, C.J.O., dissenting.

APPEAL by the plaintiffs from the judgment of Boyd, C., reported 32 O.R. 216.

The action was brought by one Langley, the assignee of one Sword, and Tooke Brothers, The Gault Brothers Company, Limited, Matthews, Towers & Company, Glover & Brais, and Cookson, Louson & Company, to declare fraudulent and void and set aside a certain agreement dated the 23rd of August, 1899, made between the said Sword and the defendant, and to set aside and recover from the defendant the payments made by Sword to him in pursuance of the said agreement, together with interest thereon from the 29th of September, 1899, and to declare that the defendant's claim for \$1,436.57 had been released or postponed to the claims of the plaintiffs other than the assignee, or was not entitled to rank on Sword's estate in competition with the plaintiffs other than the assignee, and to recover from the defendant certain shirting or the value thereof, or the shirts manufactured therefrom upon payment of a reasonable sum for manufacturing the same.

Sword was carrying on a mercantile business in Toronto, and was largely indebted to the plaintiffs other than the assignee, and to the defendant, and being financially embarrassed, applied to the plaintiffs, other than the assignee, who lived in Montreal, who, with the defendant, who lived in Hamilton, were his largest creditors, for an extension of time,

C. A.  
1901

and the following instrument was drawn up and signed by the plaintiffs other than the assignee:—

“Montreal, August 16, 1899.

LANGLEY  
v.  
VAN ALLEN.

We, the undersigned creditors of James A. Sword, hereby agree to grant him an extension of time for the payment of the notes due to each of us respectively, maturing between to-day and the 8th December, as per list exhibited by him to each of us, and to accept notes from him payable in the months of October, November, December, January, February and March next, with interest at 7% per annum. This agreement only to be valid and binding when signed by the following creditors within one week from date—Tooke Bros., The Gault Brothers Co., Ltd., Matthews, Towers & Co., Glover & Brais, Cookson, Louison & Co., E. Van Allen & Co.”

Sword having procured this instrument to be signed by the plaintiffs other than the assignee, all the parties named therein, except the defendant, sent the same to the defendant on the 17th of August, 1899, enclosed in the following letter:—

“I am sending you, by to-night's mail, agreement which I think will be very satisfactory to all. I had no trouble whatever, and, like yourself, they were all anxious to help me out. Kindly sign and return soon as possible, as I have to send it down to Montreal to shew that all the names are on it. Thanking you in anticipation, I remain, etc.”

On the 18th August, 1899, Sword wrote to the defendant as follows: “I gave my bookkeeper instructions to send you a copy of statement of affairs before I went to Montreal, but he neglected to do so. However, I am sending you by to-night's mail the exact copy I took to Montreal. . . . Hoping that you will do me the kindness of signing paper and returning at your earliest convenience.”

On the 22nd August, 1899, Sword wrote to the defendant as follows: “Please don't delay in signing that agreement. When you do, date it Friday or Saturday of last week, and oblige.”

On the 22nd August, 1899, the defendant wrote to Sword as follows:—“We have received the statement from your book-keeper, and also your letter asking us to complete the extension



and return as soon as possible. Before doing so, we will have to have a little arrangement made as to those bills maturing in July and August previous to this agreement, as we now find that there will be some little difficulty in renewing any paper that is matured and not paid. We think it would be better if you could arrange to come up here on Thursday, as I may not be home to-morrow, and we will try and have the matter arranged and signed, and you can take your paper home with you."

Accordingly, Sword went to Hamilton on Thursday the 23rd August, 1899, and saw the defendant, who took him to the office of his solicitors, when the following agreement was prepared and executed by Sword:—

"Memorandum of agreement made this twenty-third day of August, one thousand eight hundred and ninety-nine, Between James A. Sword, of Toronto, Merchant, of the first part, and E. Van Allen & Company, of Hamilton, Manufacturers, of the second part.

Whereas the said Sword being indebted to E. Van Allen & Company in a large amount, has applied to said E. Van Allen & Company for an extension, and has requested the said E. Van Allen & Company to sign a certain agreement dated 16th August, 1899, and made between the said Sword, Tooke Bros., and others, for that purpose, and the said E. Van Allen & Company have consented to sign the said agreement in consideration of the said Sword entering into this agreement and on the conditions hereinafter named. Now, this agreement witnesseth that in consideration of the said E. Van Allen & Company signing this agreement as hereinbefore stated, the said Sword covenants and agrees that he will, as they become due, pay to The Eagle Knitting Company (Limited) or order the amount of six promissory notes made this day by him in favour of The Eagle Knitting Company (Limited) for \$118 each, payable on the 25th August, 1st September, 8th September, 15th September, 22nd September, and 29th September, 1899, respectively. And it is further agreed that if the said Sword shall make default in payment of any of the said notes, the whole amount of the indebtedness of the said Sword to the said E. Van Allen & Company at the date of such default shall

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become due and payable, notwithstanding the fact that notes or acceptances maturing at a later date may have been given by the said Sword to the said E. Van Allen & Company for the same or any portion thereof. And it is further agreed that upon default being made by the said Sword in the payment of any one of the above mentioned notes, the said E. Van Allen & Company shall thereupon be released and discharged from the said agreement dated August 16, 1899, and may forthwith after such default enforce payment of all indebtedness covered or intended to be covered by the said agreement.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written."

The six promissory notes for \$118 each, payable to The Eagle Knitting Company (Limited), or order, on the 25th August, 1st September, 8th September, 15th September, 22nd September, and 29th September, 1899, respectively, were at the same time signed by Sword.

These notes covered \$236.88, the amount of a note or bill which fell due on the 15th August, 1899; the amount of a note or bill for \$116.55, which fell due on the 28th August, 1899; the amount of a note or bill for \$234.50, which fell due on the 29th August, 1899; and the amount of a note or bill for \$116.55, which fell due on the 28th September, 1899, with interest added, all of which had been or were under discount in the Bank of Hamilton.

Sword's account of the reason the defendant gave for having the notes made payable to The Eagle Knitting Company (Limited), was as follows:—"Q. And what did he say with regard to making these notes payable to them? A. He told me the bank would not discount my notes with his signature; unless they were made to a second or third party they could not use them. Q. What did he say he would get The Eagle Knitting Company to do? A. Well, he said they would use the notes. Q. Who would use the notes? A. The Eagle Knitting Company. Q. And what would they do with the proceeds? A. Of course, I suppose they would give Mr. Van Allen a cheque for them. Q. That was the reason you understood of making them payable to The Eagle Knitting Company? A. Yes. Q. You understood it was a way of paying



Mr. Van Allen? A. Yes. Q. You did not owe anything to The Eagle Knitting Company? A. No. Q. Had no dealings with them? A. No."

The defendant's account of his reason for having the notes made payable to The Eagle Knitting Company, given on direct examination, was as follows:—"Q. Why were they put in the name of The Eagle Knitting Company? A. Because we had several drafts and notes against Mr. Sword that Mr. Sword did not pay, and we were strongly of the opinion that if the drafts were left in our name, being well acquainted with Mr. Sword, he would use us as he had used us before, simply making a convenience of us to pay others, and not pay those notes. I thought if we put them in the name of a third party that Mr. Sword would be more apt to be punctual with those payments, as he had paid us little or nothing on his bills maturing for some time. That was the object." And, on cross-examination, as follows:—"Q. You put them in the name of The Eagle Knitting Company, as you say, to be more prompt. Did you tell Mr. Sword that that was the reason? A. I don't think I did. Q. What did you tell him was the reason? A. I don't know that there was any particular reason any more than I wanted him to put them in that way. Q. You must have given him some reason? A. I simply said I thought it would be better to put them in the name of a third party."

On the 24th August, 1899, the defendant wrote Sword as follows: "Enclosed you will find a copy of the agreement which the solicitors prepared. I did not read this agreement until it was sent to the factory to-day. I presume it is in conformity with the wishes of the party who was so exacting about the notes. I trust you will try and meet them as they mature in conformity with the terms of the agreement, and greatly oblige. If you will send your remittance up to the factory on Monday of each week I will see that the paper is looked after."

The defendant said on cross-examination:—"Q. Now, who was so exacting about the notes? A. Well, I don't know exactly now. Q. I just want you to explain it. A. I say I did not even read it until it was sent to the factory to-day. I presume it is in conformity with the wishes of the party who

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was so exacting about the notes. Q. Well, now, who was the party? A. I don't know unless it was the bank."

Sword paid the several notes given by him to The Eagle Knitting Company as they respectively fell due, and on the 16th day of October, 1899, made an assignment in pursuance of R.S.O. 1897 ch. 147, to the plaintiff Langley.

It was shewn that the plaintiffs, other than the assignee, had observed and kept the agreement on their part contained in the instrument of the 16th August, 1899.

On the 18th November, 1899, the plaintiffs' solicitors wrote to the defendant as follows:—

"*Re Est. James A. Sword.*

We have received instructions from Mr. James P. Langley, the assignee of this estate, to write you with regard to the extension agreement which was entered into between you and five other principal creditors of Mr. Sword on 16th August last. It appears that a secret collateral agreement was entered into by you with Sword whereby you obtained a preference over the other signatories to the extension deed. This matter will require to be adjusted with us on behalf of the assignee and the creditors interested, otherwise proceedings will be instituted against you without further notice."

On the 6th of December, 1899, this action was commenced, and it was dismissed for the reasons given in the report below.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 16th of January, 1901.

*George Kerr*, and *J. G. Shaw*, for the appellants. It is a well settled principle that in a case of this kind all the creditors must be treated alike, and the secret agreement entered into by the defendants is void, and cannot be taken advantage of by them. The principle applies to the case of an extension agreement, and the debtor himself, *a fortiori* his assignee for the benefit of creditors, can recover back money paid under the fraudulent agreement: *Howden v. Simpson* (1839), 10 A. & E. 793; *Higgins v. Pitt* (1849), 4 Exch. 312; *Smith v. Bromley* (1781), 2 Doug. 696 (n.); *Cockshott v. Bennett* (1788), 2 T.R. 763; *Leicester v. Rose* (1803), 4 East 372; *Jackman v. Mitchell* (1807), 13 Ves. 581; *Smith v. Cuff* (1817), 6 M. & S.

160; *Alsager v. Spaulding* (1838), 4 Bing. N.C. 407; *Howden v. Haigh* (1840), 11 A. & E. 1033; 3 P. & D. 661; *Norman v. Thompson* (1850), 4 Exch. 755; *Mare v. Sandford* (1859), 1 Giff. 288; *Atkinson v. Denby* (1861), 6 H. & N. 778; (1862), 7 H. & N. 934; *Wood v. Barker* (1865), L.R. 1 Eq. 139; *In re Lenzberg's Policy* (1877), 7 Ch. D. 650; *Ex parte Milner* (1885), 15 Q.B.D. 605. The learned Chancellor, relying upon the case of *Wilson v. Ray* (1839), 10 A. & E. 82, has held, however, that there can be no recovery, because the payment was made voluntarily. But it is a fallacy to say that the payment was so made, for the defendant "held the rod." *Wilson v. Ray*, if applicable at all to a case of this kind, is not consistent with prior and subsequent decisions, and should not be followed. It is, moreover, distinguishable. It is apparently founded on *Marriott v. Hampton* (1797), 7 T.R. 269, in which the rights of other creditors were not in question. The amount of the note which was overdue before the extension agreement was signed cannot be retained by the defendant, for he treated it as part of the general debt.

*Lynch-Staunton*, Q.C., for the respondent. The payments were made voluntarily, and the debtor could not have recovered them back: *Kearley v. Thomson* (1890), 24 Q.B.D. 742; and the assignee and creditors have no higher right.

*Kerr*, in reply.

September 21. OSLER, J.A.:—This action is brought by several persons, one of whom, one Langley, is the assignee under the Assignments Act for the benefit of the creditors generally of one Sword. The other plaintiffs are certain creditors of Sword, suing in their own right. The case of the assignee and that of the creditors must be separately considered, for the alleged causes of action are entirely distinct.

As regards Langley it is insisted that it is the ordinary case of a debtor seeking to recover back money paid by the debtor to one of his creditors in fraud of a composition agreement, or, which was the case here, of an agreement for the extension of time, the payment having been made by him to the creditor as a secret inducement or consideration to come into the composition or extension agreement.

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The other plaintiffs are the creditors who were, with the defendant, parties to that agreement.

Dealing first with the case of the plaintiff Langley. He represents the general creditors of his assignor, Sword, not any particular class or body of his creditors, and the rights he may enforce, except so far as they may have been extended by statute, are those of the assignor. He stands in the latter's shoes, and if Sword could have maintained no action under the circumstances neither can he, for the action is simply one to recover back money paid, as alleged, under circumstances which would have entitled the debtor to do so.

The agreement was, as I have said, not a composition agreement, but an agreement for an extension of time for payment of a certain portion of Sword's indebtedness, not to his creditors generally, but to a small body of them consisting of the defendant and plaintiffs other than Langley.

The agreement was duly executed by the defendant and these creditors, but in fraud of it the defendants had refused to execute it unless the debtor would give them notes at short dates, the latest of which matured at or about the end of the extended time, and which, except as to \$236.88, represented the debt for which the time appeared to be extended.

This was not brought to the notice of the other creditors parties to the agreement, and they were ignorant of it until after the execution of the assignment to the plaintiff Langley. Meantime, while the extended time was running, the debtor paid the notes, and it is for the money so paid that the assignee sues.

The case differs in its facts from any case hitherto decided, so far as I am aware, in this, that the money paid by Sword to the defendant was part of a debt which he really owed him, and in paying it when he did he was merely anticipating the time at which it would be due under the extension agreement. It is not the case of money paid as a premium, or of giving security to a creditor to induce him to assent to a composition or to an extension of time, or of paying him a larger composition, or his debt in full, for that purpose. The law applicable to such cases is not doubtful, and it hardly needed the long string of authorities cited to us by Mr. Kerr to establish the principle



on which the Courts have acted both at law and in equity from *Smith v. Bromley*, 2 Dougl. 696 (n.); *Cockshott v. Bennett*, 2 T.R. 763; *Smith v. Cuff*, 6 M. & S. 160; *Jackman v. Mitchell*, 13 Ves. 581, hitherto, in holding that the debtor may recover money paid or securities given in fraud of a composition or extension agreement.

The principle no doubt applies to all agreements of that nature: *Leicester v. Rose*, 4 East 372.

As Cockburn, C.J., said in *Atkinson v. Denby*, 7 H. & N. 934: "Where one person can dictate and the other has no alternative but to submit it is *coercion*, and in the language of Lord Ellenborough, 'one holds the rod and the other bows to it.'"

It is said that both parties are *in pari delicto*. It is true that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has the power to dictate, the other no alternative but to submit." And therefore if the defendant here had insisted upon security being given for the debt, or had required payment of his debt, or part of it, before he would sign the extension agreement, or if the notes had passed into the hands of *bond fide* holders against whom the debtor would have had no defence, the security would have been void, or the debtor could probably have recovered back the money as having been given or paid by coercion and in fraud of the other creditors. But it is needless to insist further upon this, for these are not the circumstances under which the money was paid to the defendant. A different rule applies here, quite as clearly recognized in the composition cases, as I may call them, as the other rule I have adverted to—the rule, namely, that money paid voluntarily cannot be recovered back. That is the ground on which the learned Chancellor disposed of the case at the trial, and I think he was right. The facts are entirely within the decision in the case of *Wilson v. Ray*, 10 A. & E. 82, the principle of which was approved of in *Gibson v. Bruce* (1843), 5 M. & G., 399, 402, note (s), and in *Atkinson v. Denby*, 6 H. & N. 778, 7 H. & N. 934, and which is treated as law in text books of authority; see notes to *Marriott v. Hampton*, 2 Sm. L.C., 10th ed., p. 409, and Leake on Contracts, 3rd ed., pp. 79, 669.

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The debtor might have refused to pay the short date notes which the defendant had obtained from him, without losing the advantage he had procured by means of the extension agreement, and without incurring any risk of the terms of the fraudulent agreement being enforced against him. But instead of doing so, or defending, as he might have successfully done, any action brought thereon by the defendant or his agents—*Brigham v. Banque Jacques Cartier* (1900), 30 S.C.R. 429—he paid them voluntarily, and the result of the authorities on that state of facts is thus stated in 2 Wms. Saunders (ed. of 1871) p. 433: “Where a note so given has been negotiated by the creditor and the holder has enforced payment from the insolvent the latter may recover back the amount from the creditor, though, if he chooses to pay the note to the creditor himself, whether voluntarily or under the compulsion of legal proceedings, he cannot recover back the amount so paid”; and in *Collins v. Blantern* (1767), 2 Wils. 341: “Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof he shall not have the help of the Court to recover it back again. You shall not have a right of action when you come into a court of justice in this unclean manner to recover it back.”

Mr. Kerr urged that the payment of the notes was enforced by a holder with whom they had been negotiated by the defendant. They never had in fact been negotiated, but were always held and controlled by the defendant. I have no doubt that the debtor knew that all along, notwithstanding the formal pretence of making them payable to the Knitting Company. He does not venture to deny that he did so, important and indeed essential as it was to his case, or that of the assignee, that he should prove if he could that he believed he was paying to the company as holders who could enforce payment from him, and the trial Judge’s decision proceeds upon this.

Mr. Kerr also relied upon *In re Lenzberg’s Policy*, 7 Ch. D. 650, but that case, when the facts are understood, is not opposed to the principle of *Wilson v. Ray*. The sole question there was how, on taking the accounts in the chief clerk’s office, certain payments should be applied,—whether upon a composition and so in discharge of a lien upon a policy of insurance which the



creditor held as security therefor, or upon the old debt or debts released and discharged by the composition deed. The creditor insisted that the payments in question had been made upon the latter, but as he could not prove this without himself setting up an illegal agreement in fraud of the composition, they were necessarily treated as applicable in discharge of the composition alone.

For these reasons I am of opinion that the plaintiff Langley has no ground of action to recover the money paid in discharge of the short date notes.

Then, as regards his claim for the goods of the insolvent in the defendant's hands. These goods were delivered to the defendant for the purpose of being worked up into garments, which was done. The defendant has a lien upon them for some amount; there is no proof of tender of any reasonable sum therefor, or of any demand for the return of the goods; the claim is of a comparatively trifling nature, and there is no ground for interfering with the judgment.

As to the claim of the other plaintiffs. So far as it is attempted to support it otherwise than under sec. 9 (2) of the Assignments Act, R.S.O. 1897 ch. 147, I have some difficulty in understanding, as their learned counsel had in stating, its precise nature. Under that clause they must stand or fall with the assignee. They can sue only in his name, and if he has no right of action, as I have attempted to shew, neither have they. They sue for the money paid by their debtor to the defendant, which, when he paid it, was his money not theirs. Mr. Kerr was unable to refer us to any authority, and I have been able to find none for the proposition that the creditors had any personal right to sue in respect of moneys or securities agreed to be paid or given by or on behalf of a debtor under circumstances which constituted a fraud upon the composition or extension, unless perhaps when the transaction remained to some extent inchoate or executory, or when the money had been paid under circumstances which would have entitled the debtor to recover it back. *Mare v. Sandford*, 1 Giff. 288; *Mare v. Warner* (1861), 3 Giff. 100; and *Wood v. Barker*, L.R. 1 Eq. 139, may be referred to, though these were not actions by creditors, of which indeed I have not found an

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instance, unless indeed *Eastabrook v. Scott* (1797), 3 Ves. 456 may be called such. That, however, was an action by the trader, a debtor, and one of the composition creditors, to compel another creditor, party to the composition deed, to deliver up certain bonds which he had obtained from the trader to secure the remainder of his debt.

The only consequence of the fraud upon the composition or extension as to the other creditors, if the assignee cannot sue, simply is that the agreement is void, and they are remitted to their original rights.

In the statement of claim it is asked that the defendant may be restrained from proving upon the estate for his debt. We have nothing to do with that in this action. That is a matter for the assignee in the first instance, and before he resists he would do well to consider the case of *Weese v. Banfield* (1895), 22 A.R. 489.

I think the appeal should be dismissed.

MACLENNAN, J.A.:—When the really important facts of this case are closely examined, the question in this appeal becomes very simple.

A debtor has two creditors. The creditors agree with the debtor and with each other to extend the time for payment of a specific part of their respective debts. It is not a case of composition. There is no stipulation for rateable or proportionate payment, or for security by pledge of or charge upon the debtor's property, but he remains, as before, master of his estate. Soon after the agreement the debtor chooses to pay one of the creditors part of the extended debt in advance, without availing himself of the extension of time. After that the debtor becomes embarrassed, and makes an assignment, and the assignee and the other creditors bring an action to recover the money. That is the whole of this case when disembarrassed of immaterial circumstances. I know of no law or authority, and none was cited to us, that on such an agreement a debtor might not lawfully make, and his creditor lawfully receive, payment before the extended time expired. He might pay all of them in the same way if they were willing to receive it, and he might pay those who were willing, though others refused. The pay-

ment to one or more could be no legal injury to the others, and would be no breach of the agreement.

The plaintiffs' case is that the defendant did agree to the extension according to its terms, and with reference to the debts specified in the schedule; and that is true. He had made a different agreement just before with the debtor; but if the two were inconsistent, the later one must prevail, the debtor and the defendant being parties to both. The debtor might have refused to pay four of the six notes in question, which represented three of those agreed to be extended, but he did not do so. He chose to pay them, just as he might have chosen to pay any of the others, without waiting for the extended time. I see no reason why, in this case, where several creditors agreed to a common extension, any one of them might not, at or before his signing of the agreement, have exacted a promise from the debtor that if he could he would pay his debt, or part of it, without waiting for the lapse of time agreed to. Such a promise would not be legally binding, but no ground can be suggested why it should not be performed; and, if performed, why it should be undone or the money recovered back. The cases in which money paid may be recovered back are collected in *Marriott v. Hampton*, 2 Sm. L. C., 10th ed., p. 409. See, also, *Wilson v. Ray*, 10 A. & E. 82, cited in the judgment.

It was very strenuously argued by Mr. Kerr, that the defendant had been guilty of fraud towards the other parties to the agreement, by requiring and receiving the six notes in question. I think it is unfortunate that the defendant did not explain to the other creditors that he did not include that part of the debt in the extension, and his reason for not doing so, but left them under the impression that he did. He ought certainly, in all candour and fairness, to have done so; nor can we approve of the letter of the 24th of August to Sword, in which he suggests, contrary to the fact, that the notes in question had been exacted by the Knitting Company. The learned Chancellor has acquitted the defendant of fraud, and I think rightly. There was what appeared to the defendant to be, and which might reasonably be regarded as, a sufficient reason for not extending those notes.

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There were three notes in the schedule—\$116.55, \$234.50, and \$116.25—maturing on the 28th and 29th of August and 28th of September respectively, and which, *prima facie*, were within the agreement for extension. But these were renewals of other dishonoured notes still in the defendant's possession, two for \$233.10 each, due respectively on the 4th of July and 4th of August. He regarded these as overdue already, and not as notes yet to mature, and his sole fault was in not making that known to the other parties. But if, even if these notes had been in fact renewed, and extended as provided by the agreement, the debtor could, as I think he could, still have paid them on an earlier day, I do not see how the taking of notes and receiving payment at maturity caused any legal damage to the plaintiffs or gave rise to a cause of action against the defendant.

The appeal should be dismissed.

Moss, J.A.:—The most plausible of the different grounds upon which the plaintiffs' right to maintain this action was put by counsel, is that the payments were made by Sword under such circumstances as entitled him to recover back the amount in an action for money had and received to his use, and that his assignee has the same right. As regards the sum of \$236.88, part of the sum sought to be recovered, Sword could not have recovered that back, for it had become due and was payable before the 16th of August, 1899, and therefore did not come within the terms of the agreement of that date, which was limited to notes maturing between that date and the 8th of December following. The extension of time did not apply to that sum, and Sword was bound to pay it at once. In paying it he merely discharged his legal duty, and his creditor was justified in receiving and retaining it.

The balance of \$471.10 was covered by the extension agreement, but it was not thereby released or discharged. The remedy for its recovery was suspended, and it could only be sued for after the expiry of the time provided for by the extension agreement. I am of opinion that the agreement between Sword and the defendant of the 23rd of August was so far fraudulent and illegal that it vitiated the extension



agreement as against the other creditors, and entitled them to proceed for the recovery of their claims as if it had never existed. The defendant, nevertheless, could not have enforced payment contrary to the terms of the extension agreement.

It was a stipulation of the latter agreement that it was not to take effect unless signed by the defendant, and in order to induce him to sign, this secret arrangement was made which, if disclosed to the other creditors, would probably have led to their repudiating the extension: and it was incapable of enforcement against Sword.

But Sword, although it was quite open to him to do so, did not invoke the extension agreement or set up the illegality of the secret arrangement in answer to the demand for payment of the notes given in pursuance of it. On the contrary, he paid them as they matured.

It is clear upon the testimony that The Eagle Knitting Company was not the holder in due course of these notes. They were made payable to that company, as Sword knew, as a matter of form, and the intention was that payment should be made not to the company but to the defendant. The Eagle Knitting Company could not have compelled payment of the notes, for against it the illegality of the transaction could have been set up as effectually as against the defendant: *Wilson v. Ray*, 10 A. & E. 82. The payments were not made under circumstances similar to those in *Smith v. Bromley*, 2 Dougl. 696 (n.): *Smith v. Cuff*, 6 M. & S. 160; or *Atkinson v. Denby*, 6 H. & N. 778: 7 H. & N. 934. In these cases one important element was that the money exacted was money which was not owing to the defendant, but was extorted by him as the price to be paid for his execution of an instrument whereby he purported to join other creditors in releasing his claim upon equal terms with them. Here there was no release of any part of the defendant's claim against Sword. What the latter was paying was part of a debt which remained owing and was to be paid at some time. In *Smith v. Cuff* there was the additional element that the notes given by the plaintiff in pursuance of the illegal agreement, had been negotiated, and the plaintiff had been compelled to make payment of one of them to the holder, against whom he had no defence—an element which has no existence in this case.

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*Wilson v. Ray*, 10 A. & E. 82, is not distinguishable. Counsel for the appellant subjected it to close criticism, but I have not been able to find that its authority has been questioned or doubted save in argument. It still stands as authority for the proposition that where a debtor gives a security to a creditor in order to induce him to agree to a composition, and afterwards voluntarily, and with full knowledge of the facts, pays the amount of the security, he cannot afterwards recover it back. That is the case where the composition has put an end to all claim save under it, and there is therefore no valid consideration for the giving of the security. *A fortiori* should it be the case where the agreement is merely an extension agreement and does not extinguish any part of the creditor's claim.

*In re Lenzberg's Policy*, 7 Ch. D. 650, seems to have proceeded upon the ground that in taking the account which had been directed, Lenzberg was *prima facie* entitled to credit upon the account arising after the composition deed of September, 1869, for the payments made by him for Kearns subsequent to that date, and that Kearns could only displace that right by setting up an illegal agreement, which the Court would not permit. Some of the expressions of Hall, V.-C., seem at variance with the decisions, and do not appear to have been essential to the disposition of the case before him.

I am, therefore, of opinion that the plaintiff Langley is not entitled to recover any portion of the \$708, and I am unable to perceive any ground upon which the other plaintiffs can compel payment of that amount or any portion of it.

I also agree with the finding in regard to the claim for shirting.

The result is that the appeal fails.

ARMOUR, C.J.O. :—(After stating the facts as above set out). It is in my opinion a fair inference from the evidence that the instrument of the 16th of August, 1899, was signed by the defendant at the same time that Sword executed the agreement with the defendant and signed the notes made in pursuance of that agreement, which was on the 23rd of August, 1899, and consequently within the week mentioned in the instrument of the 16th of August, 1899.

It is also in my opinion to be fairly inferred from the evidence that the agreement made between the defendant and Sword on the 23rd of August, 1899, was concealed from the plaintiffs, other than the assignee, for the plaintiffs' solicitors wrote to the defendant charging that he had entered into this "secret collateral agreement" with Sword and there was no denial by the defendant of it: *Bessela v. Stern* (1877), 2 C.P.D. 265.

It is alleged in the statement of claim that the plaintiffs had no notice or knowledge of this secret agreement until Sword was examined upon oath touching his property and effects pursuant to the provisions of the Assignments Act.

And there is no denial of this allegation in the statement of defence.

And it is obvious that the plaintiffs, other than the assignee, would never have kept and observed their agreement contained in the instrument of the 16th August, 1899, had they known of the agreement between the defendant and Sword of the 23rd of August, 1899, by which the whole of Sword's indebtedness might have become payable before the time had arrived to which they had agreed to grant the extension.

Having regard to these facts I do not think that the case of *Davidson v. McGregor* (1841), 8 M. & W. 755, is applicable, and the contrary was held by Lord Eldon in *Ex parte Sadler & Jackson* (1809), 15 Ves. 52.

I am unable to see how the element of fraud is eliminated by the evidence from the transaction evidenced by the agreement of the 23rd of August, 1899, between the defendant and Sword, for, in my opinion, the evidence plainly shews that this transaction was a gross fraud perpetrated by the defendant and Sword upon the plaintiffs who signed the instrument of the 16th of August, 1899, upon the understanding that it should be valid and binding only in case the defendant also signed it, and his signing it led them to believe that he was assenting to the terms of it.

A long line of cases in equity commencing with *Spurret v. Spiller* (1740), 1 Atk. 105, and at law commencing with *Cockshott v. Bennett*, 2 T.R. 763, and ending with *Brigham v. Banque Jacques Cartier*, 30 S.C.R. 429, establishes that

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such a transaction by one of the creditors is a fraud upon the others who are imposed upon.

And the rule holding such a transaction to be a fraud extends to the case of an extension of time like the present : *Cecil v. Plaistow* (1793), 1 Anst. 202 ; *Leicester v. Rose*, 4 East 372.

And also to a case like the present where some only of the creditors were concerned : *Norman v. Thompson*, 4 Exch. 755.

In such cases Lord Eldon said in *Jackman v. Mitchell*, 13 Ves. 581, that " relief is given on account, not of the individual, but of the public."

And in *Mare v. Sandford*, 1 Giff. 288, Vice-Chancellor Sir John Stuart said that " where the Court has interposed to set aside such a transaction it has done so on the ground of public policy, and of the transaction being such as the law should in the highest degree discountenance." In that case a bill of exchange had been given to one creditor in fraud of the others and judgment had been recovered on it, and satisfaction of the judgment was ordered to be entered up by the defendant.

It would seem from these cases that a court of equity would have ordered the transaction of the 23rd of August, 1899, entered into between the defendant and Sword, to be set aside and the money paid by Sword in respect of the notes given by him as part of such transaction to be paid by the defendant to Sword's assignee : *Wood v. Barker*, L.R. 1 Eq. 139 ; *In re Lenzberg's Policy*, 7 Ch. D. 650.

But, however this may be, I am of the opinion that Sword would have been entitled at law to recover back from the defendant the money so paid and that his assignee is now entitled to do so.

The defendant pretended to Sword that The Eagle Knitting Company were to be the holders for value of these notes, and he required Sword to make them payable to that company, and made him covenant by the agreement that he would pay them to that company, and that company was the party, in my belief, which he was pretending to Sword in his letter to him of the 24th of August, 1899, " was so exacting about the notes," and having led Sword to believe that The Eagle Knitting Company were the holders of them the payment of them by Sword

would not have prevented Sword from recovering the money so paid from the defendant: *Smith v. Cuff*, 6 M. & S. 160; *Horton v. Riley* (1843), 11 M. & W. 492.

Assuming, however, that he knew that The Eagle Knitting Company were merely holders of the said notes as trustees for the defendant he would, in my opinion, be still entitled to recover from the defendant the amount paid in respect of them, for it was paid by coercion.

It cannot be doubted that these notes were obtained by coercion, nor can it be doubted by any one who reads the agreement of the 23rd of August, 1899, that they were paid by coercion.

*Wilson v. Ray*, 10 A. & E. 82, is authority for holding that if a note, given for a like purpose as these were, be paid after it falls due by the giver, the holder not continuing to be the creditor of the giver, the money so paid cannot be recovered back; but here the defendant still continued to be the creditor of Sword after these notes were paid, and Sword was still in his power, and he had still the power over him that a creditor has over his debtor.

In *Smith v. Cuff*, 6 M. & S. 160, Lord Ellenborough said: "This is not a case of *par delictum*; it is oppression on one side, and submission on the other; it never can be predicated as *par delictum* when one holds the rod and the other bows to it. There was an inequality of situation between these parties: one was creditor, the other debtor, who was driven to comply with the terms which the former chose to enforce. And is there any case where money having been obtained extorsively, and by oppression, and in fraud of the party's own act as it regards the other creditors, it has been held that it may not be recovered back? On the contrary, I believe it has been uniformly decided that an action lies." And Bayley, J., said: "The reason assigned in *Smith v. Bromley* for that decision was, that the party who insisted on payment was acting with extortion and oppressively, and in the teeth of what he had agreed to accept. And does not this reason apply to the present case? The conduct of the defendant here is that of one taking undue advantage of the plaintiff's situation, and endeavouring

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to extort from him by oppression that which he stipulated not to demand."

In *Morgan v. Palmer* (1824), 2 B. & C. 729, Abbott, C.J., said: "It has been well argued that the payment having been voluntary it cannot be recovered back in an action for money had and received. I agree that such a consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, 'That which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stood upon anything like an equal footing."

In *Atkinson v. Denby*, 7 H. & N. 934, Cockburn, C.J., delivering the judgment of the Exchequer Chamber, said: "We are all of opinion that *Smith v. Bromley* and *Smith v. Cuff* govern the present case. . . . Where a debtor offers his creditors a composition, whereby they are all to receive the same proportionate amount in respect of their debts, it is contrary to the policy of the law to allow him to purchase the consent of one creditor by payment of his debt in full. It is said that both parties are *in pari delicto*. It is true that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has the power to dictate, the other no alternative but to submit." See also *Smith v. Bromley*, 2 Doug. 696 (n.); *Stock v. Mawson* (1798), 1 B. & P. 286.

In *Kearley v. Thompson*, 24 Q.B.D., 742, Fry, L.J., after quoting from *Collins v. Blantern* the general rule that "whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to recover it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back," said: "To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of these is the case of oppressor and oppressed, in which case usually the oppressed party may recover the money back from the oppressor." See also *In re Lenzberg's Policy*, 7 Ch. D. 650.

It is said that the recovery of the money paid by Sword in respect of these notes should not include the sum of \$236.88, being the amount of the bill or note which fell due on the 15th



of August, 1899, the day before the date of the instrument of the 16th of August, 1899, but the amount of this bill or note was included in the transaction of the 23rd of August, 1899, which was an entire thing, and part being fraudulent the whole is fraudulent. The whole transaction was an entire agreement, and the fraud vitiated the whole: *Howden v. Haigh*, 11 A. & E. 1033; *Higgins v. Pitt*, 4 Exch. 312.

I do not think, moreover, that the plaintiffs, other than the assignee, are without remedy against the defendant for his breach of the agreement contained in the instrument of the 16th of August, 1899, and for the fraud perpetrated by him upon them in respect thereof.

This instrument was a binding contract between the signers of it, the agreement of each being the consideration for the agreement of the others, and was enforceable by each against the others, and it is, in my opinion, clear that had the plaintiffs, other than the assignee, been made aware of the transaction of the 23rd of August, 1899, at the time it was entered into they would have been entitled to have it set aside and the agreement of that date made between the defendant and Sword and the notes given in pursuance thereof delivered up to be cancelled: *Eastabrook v. Scott*, 3 Ves. 456.

And I see no reason why they should not now be entitled to have the transaction set aside and the money paid in respect thereof handed over to the plaintiff, the assignee, for the benefit of the creditors, Sword's assets having been diminished to the extent by which the defendant profited by the perpetration of the fraud.

It is said that there is no precedent for such relief, but new wrongs require new remedies, and it is the duty of the Court to provide them.

I do not see, however, how the defendant can be prevented from ranking on Sword's estate for the amount of his claim of \$1,436.57 filed with the assignee, subject to its correctness in itself.

And as to the claim in respect of the shirting, I am not disposed to dissent from the disposition made by the learned Chancellor of it.

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In my opinion, therefore, the appeal should be allowed, the transaction of the 23rd of August, 1899, set aside, and the money paid by Sword in respect of the notes given by him in that transaction paid by the defendant to the plaintiff the assignee, with interest thereon from the respective dates of the payment thereof, and that judgment be entered accordingly with costs here and below.

*Appeal dismissed, ARMOUR, C.J.O.,  
dissenting.*

R. S. C.

[STREET, J.]

MIDDLETON V. SCOTT.

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*Mortgage—Mortgagee's costs—Unnecessary proceedings—Tender—Waiver.*

A mortgagee, as a holder of an overdue debt, is entitled to take the promptest proceedings to recover it and to the costs of such proceedings but if he abandon them he cannot then claim the costs.

A mortgagor's solicitor left a letter at the office of the mortgagee's solicitor stating that if the latter would call at his office he could have the principal and interest then due on the mortgage, naming the amount correctly. The mortgagee's solicitor did not call; and some days later the mortgagor's solicitor wrote to the mortgagee telling her he was prepared to pay the said sum, which letter the mortgagee's solicitor answered by stating the amount claimed, which included subsequent interest and certain costs, the right to which had long been in dispute between the two solicitors, and adding that the whole matter of dispute between them hinged upon the right to these costs:—

*Held*, that the latter words were merely descriptive of the question in controversy and could not be treated as a waiver of the proper tender, and that the mortgagee was entitled to have the money unconditionally produced and offered to her or her solicitor by the mortgagor, which had not been done in this case.

APPEAL by defendant from the report of the local Master at Chatham, argued before STREET, J., in Court at Toronto on October 30th, 1901. The facts are stated in the judgment.

*W. E. Middleton*, for the defendant, referred as to costs to *Cotterell v. Stratton* (1872), L.R. 8 Ch. 295, and *National Provincial Bank of England v. Games* (1886), 31 Ch. D. 582; and on the question of the sufficiency of the tender to *Thompson v. Hamilton* (1836), 5 O.S. 111; *Howell v. Listowell Rink and Park Co.* (1886), 13 O.R. 476, at p. 488; *Thomas v.*

*Evans* (1808), 10 East 101; *Harding v. Davies* (1825), 2 C. & P. 77; *Douglas v. Patrick* (1790), 3 T.R. 683; *Powney v. Blomberg* (1844), 8 Jur. 746, at p. 750.

*M. Wilson, K.C., and F. E. O'Flynn*, for the plaintiff, contended that the tender was sufficient in that when the mortgage fell due the money was brought to the place established by the acts of the parties to be paid over; and that the costs incurred were quite unnecessary, and could not properly be demanded: *Watson v. Ham* (1876), 1 Ch. Ch. 295; *Meyers v. Meyers* (1874), 21 Gr. 214 at p. 220; *McTaggart v. Toothe* (1884), 10 P.R. 261, at p. 263; *Lyon v. Ryerson* (1897), 17 P.R. 516, at p. 518; *Perry v. Perry* (1884), 10 P.R. 275; *In re Flint and Jellett, Attorneys* (1880), 8 P.R. 361; that there have been cases where mortgages were ordered to pay costs: *Cornwall v. Brown* (1852), 3 Gr. 633; *Souter v. Burnham* (1863), 10 Gr. 375.

*Middleton*, in reply, pointed out that the costs in question were not incurred until the mortgage was two months in default, and contended that they were reasonably and properly incurred.

November 21. STREET, J.:—The defendant is the holder of a mortgage, dated October 25th, 1893, for \$300, bearing interest at 8 per cent., payable yearly on October 25th. The principal became due October 25th, 1898.

The plaintiff became the owner of the equity of redemption in August, 1894, and paid the instalment due in that year, with the addition of some costs for a notice under the power of sale.

The mortgage contains a power of sale which is exerciseable after two months' default; it also contains a provision for the payment of compound interest at 8 per cent. upon arrears of interest, but no provision for the payment of any special rate of interest upon overdue principal, although such a provision appears perhaps to have been intended to be included in the language used with regard to the interest upon overdue interest.

On January 4th, 1896, the instalment of interest due October 25th, 1895, had not been paid, and the defendant's solicitor, in whose hands the mortgage lay, wrote to the plaintiff demanding payment and threatening proceedings, dating his

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letter on December 26th, 1895. This letter appears to have been posted on January 4th, 1896, and it reached the defendant in the ordinary course of post on the evening of January 6th, 1896; he came into Chatham on the morning of January 7th, 1896, and tendered the overdue interest, with compound interest, to the defendant's solicitor, who refused to receive it unless the plaintiff would also pay some \$11 which he said he had incurred for costs of drawing notices under the power of sale and for delivering them to the bailiff for service. The plaintiff refused to pay anything for costs. Nothing further was done until October 27th, 1896, when the plaintiff tendered \$48.40 to the defendant's solicitor, who again claimed the costs under the power of sale, reducing his claim, however, to \$8.13. The plaintiff again refused to pay these costs, and the defendant's solicitor refused to receive the amount tendered. The same thing happened on November 8th, 1897, the sum then tendered being \$72.48. In 1898 the plaintiff went to the office of the defendant's solicitor on October 25th with his solicitor to pay the principal and interest upon the mortgage, but not finding him in left a letter saying that \$396.48 was in his hands ready to be paid over, and that if the defendant's solicitor would call at his office on the next day he would pay that amount. On November 2nd, 1898 (or, perhaps, December 2nd, 1898), the plaintiff's solicitor wrote to the defendant herself, who lived at Dutton, in the county of Elgin, reciting the various steps he had taken, and telling her that he was prepared to pay the \$396.48 as the amount due for principal and interest, but refusing to pay any costs. The defendant's solicitor replied on December 5, 1898, to this letter, claiming amount due as follows:—

Principal,	.. .. .	\$300.00	
Interest due Oct. 25th, 1895,		24.00	
“ “ “ 1896,		25.92	
“ “ “ 1897,		27.99	
“ “ “ 1898,		33.23	
“ to Nov. 5th, 1898,		3.75	meaning prob-
			ably Dec. 5th.
Costs,	.. .. .	8.13	

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\$422.02



He went on to say: "You say you are ready to pay \$396.48. If I am wrong in my contention that I am entitled to sale costs as far as taken, viz., placing the notice of sale in the bailiffs' hands, the offer to pay \$24.40 by you and Mr. O'Flynn was not far out of the way, *but upon this the whole question hinges, and I am prepared to stand upon that ground.*" He then went on to offer to submit the question in dispute between them to any professional man in Chatham, where both solicitors lived.

On December 28th, 1898, the defendant's solicitor wrote to the plaintiff that *proceedings would be taken* unless the mortgage interest and costs were settled. On January 24th, 1900, the plaintiff brought the present action to redeem, alleging that he had tendered to the defendant \$396.48 on October 25th, 1898, and that the tender had been refused, and averring a continual readiness to pay that sum. The defendant, in her answer, sets up that proceedings were taken under the power of sale, to recover the interest in default, on October 25th, 1895, but that on account of the negotiations which thereupon took place, the notices under the power of sale were never served; that neither the principal nor interest had been tendered at any time, and that she has always been willing to accept principal and interest and costs. The plaintiff replies that the defendants have no valid or proper claim to costs.

The action came down for trial at the Chatham Assizes before the Hon. Mr. Justice Meredith, who referred it to the local Master to ascertain and state the amount due on the mortgage, and to make all necessary enquiries, etc., for redemption or foreclosure; to report special circumstances, and with leave to either party to amend. The only provisions contained in the judgment with regard to costs are that if the plaintiff make default in payment of the amount, if any, found due the defendant, he shall pay the costs; and that if no greater sum than \$396.48 is found due to the defendant, the defendant is to pay the costs. Further directions are not reserved, nor is any question of costs save as I have mentioned.

The plaintiff's evidence was taken *de bene esse* at great length on June 14th, 1900, and the defendant was examined for discovery at almost equal length on May 18th, 1900, and

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these depositions, together with twenty-seven pages of closely written evidence and many exhibits, are dealt with by the learned Master in his elaborate report. In this he finds, amongst other things, that there was no necessity for the incurring of any costs by the defendant, and that the costs (if incurred) were not reasonably or necessarily incurred, and that no sum was due or payable by the plaintiff to the defendant for costs: that the plaintiff has always been ready and willing to pay principal and interest, but not costs, and that the defendant has always insisted upon her right to costs, and that for that reason a tender of the principal and interest without the costs would have been a useless form, and that the defendant was aware that the plaintiff was ready and willing on October 25th, 1898, to pay the principal and interest to defendant, but that the defendant was unwilling to accept the same unless the plaintiff would pay the subsequent interest and the costs, and that since October 25th, 1898, the sum of \$396.48 had been set apart and deposited with the plaintiff's solicitor for the purpose of paying the amount due, as the defendant and her solicitor well knew. He further finds that tender was excused, and that the defendant is entitled only to the \$396.48.

The defendant appealed against this report upon the ground that the Master erred in finding the amount due to the plaintiff to be no more than \$396.48, and improperly disallowed the costs claimed by the defendant, and improperly found that that sum had been tendered, and improperly admitted evidence of and found excuses for tender.

The Master has not found either that the defendant's solicitor had or had not taken the alleged proceedings under the power of sale in December, 1895, or January, 1896, which were the cause of the whole trouble between the parties. If they were taken, as alleged, and at the time alleged, by the defendant's solicitor, I do not see how the plaintiff could have justified his refusal to pay them at the time. It is quite true that these proceedings, if they were taken, do appear to have been taken without any necessity, and the circumstances expose the defendant's solicitor, who alleges he took them, to the imputation of having taken them in his own interest rather than in that of his client, for he never followed them up, and

they have served no good purpose. But the question of the necessity for proceedings is not the sole ground upon which the right to the costs of them rests. The holder of an overdue debt is entitled, if he deems proper to do so, to take the promptest proceedings to recover it, and his right to recover the costs of the proceedings does not depend upon his being able to give satisfactory reasons for having taken them.

In the case of the alleged proceedings upon this power of sale, however, the defendant's solicitor, in the notice of exercising the power, which he produces as that which he drew and intended to serve, has merely demanded the interest then overdue. He says he withdrew the notices from the bailiffs' hands after the plaintiff had offered to pay the overdue interest but no costs, and that down to the present time he has done nothing further. It would be obviously wrong to proceed upon a notice under the power of sale in which only the interest for the year 1895 is asked for, after the interest for the two following years had accrued due, because a mortgagee cannot split up his demand in order to increase costs, and as nothing was done under the notice for which these costs are claimed, during its currency, so to speak, I think it is fair to assume that the intention to serve it or to proceed under it was abandoned. Having been abandoned, the proceedings are to be treated for the purposes of the present action as never having been taken, and the costs claimed for them as never having been incurred. It is these costs which have been the cause of the present most unfortunate and unnecessary litigation, and if the plaintiffs had been a little more careful to put themselves in the right by making a proper tender of the principal and interest, the whole costs of it must have fallen upon the defendant under the terms of the judgment.

Under the authorities, however, I feel obliged to hold that a tender was neither made nor excused so as to stop the running of interest. I need not consider the tenders of mere interest, for nothing seems to turn upon them in the result; it is the action of the plaintiff and his solicitor when the principal matured that must be dealt with.

The plaintiff's solicitor says that he went to the office of the defendant's solicitor on October 25th, 1898, and finding that he

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was not in, and that no one was there who knew anything of the matter, he left a letter addressed to him telling him that he was prepared to pay the principal and interest due to that date, \$396.48, without costs, and that the defendant's solicitor might have it by calling at his office. I think the sum named was the proper sum then due. The defendant's solicitor did not call for the amount. Then the plaintiff's solicitor, some days or weeks later, wrote to the defendant herself at Dutton, telling her that he was prepared to pay \$396.48, but no costs, and this letter was answered by the defendant's solicitor, who sent a statement of the sum he claimed, including \$8.13 for costs, and claiming also the interest since the maturity of the mortgage. The expression he used in that letter, that the whole matter hinged upon his right to the costs, are merely descriptive of the question in controversy, and cannot be treated as a waiver of a tender. In many cases in the courts, where the dispute is as to the precise amount due, each party before action has asserted and adhered to his own view of it, and has asserted it in his pleadings, but this of itself has never been held to amount to a waiver of a tender of the amount admitted to be due. The creditor is entitled to have the actual money unconditionally offered to him by his debtor, unless he tells the debtor that he need not take the trouble to produce and tender it; nothing short of this will operate to stop interest from running, and the rule has always been as strong in equity as at law. In 1751 Lord Hardwicke, in *Bishop v. Church*, 2 Ves. Sr. 371, at p. 372, says: "There are several instances of mortgages where there are many attempts by a mortgagor to pay them off, and reasonable offers of payment; yet if a strict tender is not made, the Court cannot stop the interest: though cases may be where the Court wish to do it: that of acting a more generous, kind part if mortgagee had taken it, is not what the Court has to go by."

Again, in 1755, in *Garforth v. Bradley*, 2 Ves. Sr. 675, at p. 678, he says: "But the rule is so strict that where a certain security is taken by mortgagees, their interest shall not stop but upon a proper tender and notice, which rules, if not observed, the Court will not stop the interest."

These cases are referred to, as setting forth the law at the present day, in the last edition of Fisher on Mortgages, paragraph 1851.

I have referred also to the following later cases: *Thomas v. Evans*, 10 East 101; *Scarfe v. Morgan* (1838), 4 M. & W. 270, 279 *et seq.*; *Powney v. Blomberg*, 8 Jur. 746, 749, 750; *Dixon v. Clark* (1848), 5 C.B. 365, 377; *Allen v. Smith* (1862), 12 C.B.N.S. 638; *Kinnaird v. Trollope* (1889), 42 Ch. D. 610, 618; *Leake on Contracts*, 3rd ed., p. 743; *Jones v. Tarleton* (1842), 9 M. & W. 675; *Kerford v. Mondel* (1859), 28 L.J. Ex. 303. In the last two cases it will be noticed that the circumstances which were held to operate as a waiver of an actual tender included the presence of the debtor or his agent with the money in his possession ready to be tendered.

In the present case there has never been at any time the production of the money due the defendant to her or her solicitor at any time after it became due, nor did the plaintiff or his solicitor at any time attend the defendant or her solicitor with the money, nor did the defendant's solicitor at any time ever, in my opinion, do anything sufficient, according to the authorities, to absolve the plaintiff from the necessity for making a tender and to stop interest from running.

The Master's report must, therefore, be amended by declaring that no tender was made by the plaintiff to the defendant excepting of the interest due in 1895, 1896 and 1897, and that the defendant did not waive tender of the amount due, and that the defendant is entitled to \$396.48, with interest at 6 per cent. on \$300 from October 25th, 1898, and on \$24 with interest at 8 per cent. from that date. There will be no costs of the appeal, and it will be unnecessary that the matter should go back to the Master. He has fixed no time for redemption, and the report will be amended by fixing the usual period and calculating the interest to the date so fixed.

Further directions are not reserved, and under the terms of the judgment and the result of the enquiry, neither party is entitled to recover any costs of the action.

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[MACMAHON, J.]

Nov. 18.

SECOR V. GRAY.

*Evidence—Corroborative Evidence—Advance of Money—Claim of Interest—  
Promissory Note—Action on Original Consideration.*

The plaintiff sued the surviving member of a firm, together with the representatives of a deceased member, for money loaned by him in the lifetime of the deceased, to the firm for the purposes of the firm. He also claimed interest, as having been stipulated for at the time :—

*Held*, that inasmuch as there was corroboration as to the main fact, namely the borrowing of the principal, this was sufficient to entitle the plaintiff to recover the interest claimed.

When a promissory note is taken from a borrower as collateral security for money loaned to him, and not in payment, action can be brought for the money lent, notwithstanding that owing to the form of the note it may not be maintainable thereon.

THIS was an action brought against the executor of the will of Jane Cleghorn, deceased, and Thomas Cleghorn, to recover the sum of \$1,800, money lent under the circumstances mentioned in the judgment, where the authorities cited on the argument are also referred to.

The trial took place at Toronto before MACMAHON, J., without a jury, in October, 1901.

*W. G. Thurston*, for the plaintiff.

*G. F. Shepley*, K.C., and *J. Baird*, for the executors of Jane Cleghorn.

November 18. MACMAHON, J.:—As to the first \$1,000, I find that Jane Cleghorn and Thomas Cleghorn, her son, were carrying on business in Toronto under the name of J. Cleghorn & Co., and about May, 1897, Thomas Cleghorn—who is a son-in-law of the plaintiff—asked the latter if he had any money, stating that the firm was in need, and gave the plaintiff to understand they would be seriously embarrassed unless the sum of \$1,000 was obtained. The day after Thomas had spoken to the plaintiff, the plaintiff saw Jane Cleghorn, who asked him to lend the firm the \$1,000. The plaintiff, a short time prior to the date on which he alleged he lent the \$1,000 had a sum of somewhere about \$2,000 on deposit in the Dominion Bank, which he drew out and had in his house. I find he did lend the sum of \$1,000 to the firm of J. Cleghorn & Co., the money being given by him to Thomas. After Thomas had



received the \$1,000, the plaintiff saw Jane Cleghorn, who spoke of the loan made by him to the firm. Thomas deposited the \$1,000 in the Bank of Hamilton to his own credit. Out of this he paid the firm's liabilities due to various parties, amounting to somewhere near \$500. A cheque for \$500 was given by him to the manager of the bank as security for the current indebtedness of the firm, and that is fully borne out by the evidence of the dealings between Thomas and his mother in which that \$500 is referred to.

The plaintiff, who by reason of his age is somewhat defective in memory, has given very fairly and honestly as far as he could remember the circumstances in connection with the two loans of \$1,000 and of \$800. He stated the \$800 was lent to the firm; that being in J. Cleghorn & Co.'s store one day, Mrs. Cleghorn asked him to lend it, stating that the firm was in embarrassed circumstances and wanted the money. He gave the \$800 to Thomas, who, he says, was present at the time the request was made by his mother for the loan, and who joined in the request so made. When Thomas received the \$800, he deposited it to the credit of the firm, and it went to pay their liabilities. The note which was given for that advance is dated on the day on which the money was received from the plaintiff, but both the plaintiff and Thomas Cleghorn agree that the note was not delivered to the plaintiff until some few weeks after the advance was made. The plaintiff is under the impression that he received the note from the hands of Thomas. Thomas says he gave it to his wife (a daughter of the plaintiff), who is the payee of the note, and she gave it to her father. She (the payee) is not the first indorser on the note, the first indorser being Mrs. Jane Cleghorn.

The defendant Thomas H. Cleghorn does not dispute his liability as to the \$800. But counsel for the executor of Jane Cleghorn's estate urges that her estate is not liable in respect of the \$800 advanced by the plaintiff and for which the note was given, relying on *Canadian Bank of Commerce v. Perram* (1899), 31 O.R. 116, and *Jenkins v. Coomber* (1898), 2 Q.B. 168.

The note made by Thomas Cleghorn, one of the partners, and indorsed by Jane Cleghorn, the other partner, was, as I find, received by the plaintiff as evidencing the firm's debt to

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MacMahon, J. him and as collateral security therefor. Had the plaintiff sued  
1901 Jane Cleghorn on the note only, indorsed as it was by her prior  
SECOR to its being indorsed by the payee, he could not have recovered :  
v. *Canadian Bank of Commerce v. Perram*, 31 O.R. 116 ; *Small*  
GRAY. *v. Henderson* (1899), 27 A.R. 492 ; and see *Robinson v. Mann*,  
2 O.L.R. at p. 65. But unless he had taken the note in  
payment of the claim against the firm of J. Cleghorn & Co., he  
could recover against her for money lent to the firm of which  
she was a member. That is the form in which the plaintiff  
brings his action against her estate, and he, I think, is entitled  
to judgment for the \$800 lent, with interest.

The plaintiff says that interest was spoken of at the time  
the \$1,000 was borrowed, that Mrs. Cleghorn asked him what  
the interest would be, and he told her it would be five per cent.  
Thomas Cleghorn says he has no recollection of it being  
mentioned. There is corroboration as to the main fact, as to  
the borrowing, and that is, I consider, sufficient to entitle him  
to recover the interest claimed. The firm was getting the  
benefit of the plaintiff's money in the carrying on of the  
business.

There will be judgment for the plaintiff against the defen-  
dant Robert M. Gray, as executor of the estate of Jane  
Cleghorn, deceased, and against Thomas H. Cleghorn for \$1,000  
and interest thereon at the rate of five per cent. from the 26th  
of May, 1897 ; and also for the sum of \$800 with interest  
thereon from the 8th day of December, 1898, at five per cent.  
per annum, together with costs of suit.

A. H. F. L.

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## [IN THE COURT OF APPEAL.]

IN RE THE ARMY AND NAVY CLOTHING COMPANY OF  
TORONTO (LIMITED).

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Nov. 6.

*Company—Winding-up—Liquidator's Bond—Money Received as Assignee—  
Appeal—Finality of Certificate.*

After the assignee for the benefit of creditors of an incorporated company had sold part of the assets and received the proceeds he was appointed liquidator under the Winding-up Act, and gave security by a bond which recited all the proceedings and orders and was conditioned to be void if the liquidator should duly account for what he should receive or become liable to pay as liquidator :

*Held*, that the funds and property in the hands of the assignee became vested in him as liquidator upon his appointment as such and that the sureties were responsible for his subsequent misappropriation thereof.

The bond provided that the certificate of the Master in Ordinary of the amount for which the liquidator was liable should be sufficient evidence of liability as against the sureties and should form a valid and binding charge against them :

*Held*, that the sureties had the right to appeal from the certificate in accordance with the usual practice of the Court.

Judgment of a Divisional Court affirmed.

APPEAL by the Employers' Liability Assurance Corporation (Limited), from the judgment of a Divisional Court.

The appellants were sureties upon a bond for \$15,000 given on the 7th of April, 1898, by one E. J. Henderson, as liquidator of the Army and Navy Clothing Company of Toronto, Limited, to the Accountant of the Supreme Court of Judicature for Ontario, and the contest in the appeal was as to the extent of their liability.

On the 11th of January, 1898, after the company had made pursuant to the provisions of the Assignments and Preferences Acts, an assignment to Henderson for the benefit of their creditors, an order was made for the winding-up of the company. On the same day a supplemental order was made appointing Henderson "interim liquidator of the property, assets, and effects of the company until a permanent liquidator is appointed as hereinafter provided, upon his giving security to the satisfaction of the Master in Ordinary of this Court for the due and proper performance of his duties as such liquidator;" providing for the payment of certain claims for rent and taxes: directing the usual proceedings to be taken before

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the Master in Ordinary; and containing the following special provisions bearing upon the question involved in this appeal:—

And this Court doth declare that the said Edward James Henderson, as such provisional or interim liquidator, is entitled to receive from the assignee for the benefit of creditors of the said company under an assignment executed and delivered by the said company after the commencement of the winding-up proceedings herein, all the property, assets and effects of the said the Army and Navy Clothing Company of Toronto, Limited, for the purpose of the winding-up under the direction of this Court, and in pursuance of the order of this Court and of the provisions of the said Acts, subject, however, to the charges hereinbefore declared, and doth order the same accordingly.

And this Court doth further order that the said assignee for the benefit of creditors, hereinbefore referred to, do forthwith after payment to him of the commission and remuneration to which he is entitled, deliver all the property, assets and effects of the said company in his hands to the said provisional or interim liquidator accordingly for the purposes hereinbefore stated.

And this Court doth further order that it be referred to the Master in Ordinary of the Supreme Court of Judicature for Ontario to appoint a permanent liquidator or liquidators of the property, estate and effects of the said company for the purpose of the winding-up of the affairs of the said company under the said Acts and amendments, and to fix the amount of the security to be given by the said liquidator or liquidators, which security is to be furnished by the said liquidator or liquidators to the satisfaction of the said Master in Ordinary.

“And this Court doth further order that the said Master in Ordinary do fix and determine the remuneration to be paid to the said provisional or interim liquidator and the permanent liquidator or liquidators to be appointed as aforesaid, and do also fix and determine the commission and remuneration to be allowed to the said Edward James Henderson as assignee for the benefit of creditors prior and up to the time of the delivery over by him to the said provisional liquidator of the assets, property and estate of the said company.”



Leave was reserved to Henderson, as assignee, or to any creditor, to move, after the statutory meeting of creditors under the assignment, to rescind the winding-up order, and to allow proceedings to continue under the assignment. A motion was, pursuant to this leave, subsequently made, and on the 27th of January, 1898, the following order was granted :—" This Court doth order that, notwithstanding anything contained in the said orders of the 11th of January instant, the perfecting of the appointment of the interim liquidator and the appointment of a permanent liquidator of the property, assets and effects of the said Army and Navy Company of Toronto, Limited, under the provisions of the said Winding-up Act and amendments thereto, be deferred until the further order of this Court, and that the said Edward James Henderson, the assignee for the benefit of creditors of the said Army and Navy Clothing Company of Toronto, Limited, under the deed of assignment from said company to him dated 3rd January, 1898, be and the same is hereby directed and empowered as such assignee to retain possession of all of, the assets and effects, books of account papers and documents of the said Army and Navy Clothing Company of Toronto, Limited, and to proceed with the administration of the assets of the company and with the winding-up of the said estate under the provisions of the said deed of assignment to him, and in pursuance of the powers conferred upon him as such assignee by the said deed of assignment and the Act respecting assignments and preferences by insolvent persons, and of all other statutes in that behalf; subject, however, to the rights of the city of Toronto (taxes) and H. Cawthra and Wm. Mulock (rent).

This Court doth further order that the said assignee and any creditor or other party to these proceedings who deems that his or her interests, or the interests of the creditors generally, are being prejudiced, may, at any time, apply to a judge in chambers for liberty to proceed under the said orders upon such terms as may be proper."

Special provisions were added as to the claims for rent and taxes, and in respect of some goods delivered after the application for the winding-up order, and costs were provided for.

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Henderson proceeded, as assignee, to realize the assets of the company, but an application was made to continue the proceedings under the Winding-up Act, and this motion (by adjournment from Chambers) was heard by the Divisional Court on the 16th of March, 1898, and the following order was made:—  
“This Court doth order that the stay of proceedings under the Winding-up Act, directed by the order of (the 27th of January, 1898), be and the same is hereby removed, and that the winding-up of the said company do proceed under the said orders of the 11th day of January, 1898, and that the said Edward James Henderson, assignee for the benefit of creditors of the said the Army and Navy Clothing Company, Limited, do forthwith on the appointment of an interim or permanent liquidator of the said company, deliver over to the interim or permanent liquidator of the said company all the assets and effects, books of account, papers and documents of the said the Army and Navy Clothing Company of Toronto, Limited, now in his possession, subject to his claim for what, if anything, may be found due to him for disbursements or liabilities heretofore properly incurred by him as such assignee, for commission and remuneration, and for such sums as may be allowed by the Master for inspector’s fees, which claim shall form a first preferential lien on all said assets and effects, and do account to the liquidator of the said company for all the assets and effects of the said company which may have come into his possession as assignee of the said company.

And this Court, as a condition of this order, doth hereby ratify and confirm whatsoever the said assignee may properly have done under the said assignment which might have been properly done by the liquidator under the said winding-up order.”

The winding-up of the company was then proceeded with before the Master in Ordinary, who, on the 4th of April, 1898, appointed Henderson liquidator of the company, subject to his giving security in the sum of \$15,000, and the bond under which the questions in this appeal arose was given by the appellants, and was approved of and accepted by the Master in Ordinary. This bond, after reciting in general terms the four orders above referred to, and the appointment of Henderson as

“permanent liquidator of the property, estate, and effects of the said company, upon his giving security,” and the giving of the bond for that purpose, proceeded as follows:—“Now, the condition of the above written obligation is such that if the said Edward James Henderson, his executors or administrators, or any of them, do and shall obey all lawful orders of the said Court in respect of the winding-up of the said company, and shall duly account for what he, the said Edward James Henderson, shall receive or become liable to pay as liquidator of the property, estate and effects of the said company at such period and in such manner as the Court or the said Master in Ordinary shall direct, then this obligation to be void, otherwise to remain in full force and virtue.

And it is hereby distinctly understood and agreed between the parties hereto, and particularly by the said obligors herein, that a certificate under the hand of the said Master in Ordinary of the amount for which the said Edward James Henderson is liable as such liquidator, shall be sufficient evidence against him, his executors and administrators, and against the said Employers' Liability Assurance Corporation, Limited, and also as between the said Assurance Corporation and the obligee herein of the liability and indebtedness of the said Edward James Henderson as such liquidator to the amount of the sum stated in such certificate, and the amount so found shall form a valid and binding charge and claim not only against the said Edward James Henderson, his executors, administrators and assigns, but also against the said corporation and the funds and property thereof, without it being necessary for the obligee to take legal proceedings for the recovery thereof, and without any further or other proof being given, or any action, suit or proceedings taken to enforce this bond against the said corporation or against the said Edward James Henderson.

Provided always that in taking and allowing the accounts of the said Edward James Henderson, as such liquidator, due and sufficient notice of the times and places when the said accounts of the said Edward James Henderson, as such liquidator, are taken and allowed, is to be given to the said corporation.”

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On the 20th of October, 1898, Henderson produced his accounts as assignee before the Master in Ordinary, and it was found thereby that there was a balance in his hands, after deducting all proper charges therefrom, of \$9,546.45. Two sums of \$246.75 and \$15 subsequently came to the hands of said Henderson from assets of the said estate. On the 17th of November, 1898, Henderson opened a bank account as liquidator, and deposited to the credit of that account the sum of \$7,752.31; and on the 28th of May, 1900, a further sum of \$1,400. Litigation took place as to certain claims, and the closing of the estate was delayed. Henderson absconded in July, 1900, having from time to time up up to that date made proper payments out of this account amounting to \$2,515.51, and having withdrawn the balance by cheques in his own favour. His accounts were taken, after notice to and in presence of the appellants, by the Master in Ordinary, who, on the 22nd of December, 1900, issued his certificate or report under his hand, finding Henderson liable to account as liquidator for the sum of \$7,889.40, ordering him to pay that sum to the Provincial Trust Company of Ontario, Limited, who had been appointed liquidators in his stead, and, in default of payment by him, ordering the appellants to pay. An appeal to the Divisional Court was dismissed, and a further appeal (by leave) was then brought, and was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, and LISTER, J.J.A., and LOUNT, J., on the 7th of June, 1901. In both Courts the objection was urged that under the terms of the bond the certificate of the Master in Ordinary was final.

*James Bicknell*, for the appellants.

*J. A. Macintosh*, for the respondents.

November 6. ARMOUR, C.J.O.:—The appellants were, in my opinion, entitled to appeal from the report of the Master fixing the amount of their liability under the bond given by them, and consequently this appeal is properly before us for adjudication.

The bond executed by the appellants contained recitals of all the orders made by the Court and of the appointment of Henderson as permanent liquidator of the property, assets and

effects, and the appellants executed the bond as security for the proper performance by Henderson of his duties as such liquidator, and cannot now be heard to object to the jurisdiction of the Court to make these orders or to the validity of the appointment of Henderson as such liquidator.

The condition of the bond was "that if the said Edward James Henderson, his executors or administrators, or any of them, do and shall obey all lawful orders of the said Court in respect of the winding-up of the said company, and shall duly account for what he, the said Edward James Henderson, shall receive or become liable to pay as liquidator of the property, estate and effects of the said company at such period and in such manner as the Court or the said Master in Ordinary shall direct," then the obligation should be void, otherwise to remain in full force and virtue.

The effect of the several orders above referred to, and of the appointment of Henderson as permanent liquidator, and the approval of the said bond, was that the property, estate and effects of the said company theretofore in his hands as assignee of the said company, became the property, estate and effects of the said company in his hands as liquidator, and were, property, estate and effects of the said company, received by him, as such liquidator, within the condition of the bond, and which, by the terms of the condition, he was bound to duly account for at such period and in such manner as the Court or the said Master in Ordinary should direct: *Middleton v. Chichester* (1871), L.R. 6 Ch. 152.

And I do not think that the mode adopted by him of keeping his bank account, or whether he kept the money realized from the property, estate and effects of the company in his private account in the bank or in an account opened in the bank in his name as liquidator, or whether he kept the money in his own possession at all, affected his liability for it as liquidator.

The appeal should, therefore, be dismissed with costs.

OSLER, J.A.:—The first question is what is the extent of the appellants' obligation under their bond.

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The bond was given as the security on the appointment of one Henderson as permanent liquidator of the Army and Navy Clothing Company of Toronto (Limited). He was appointed by order of the 4th of April, 1898, subject to his giving security as required by the Act. The bond bears to be executed on the 7th of April, and it was approved by the Master in Ordinary on the 13th of April, 1898.

Henderson had been assignee of the estate of the company under an assignment made in pursuance of the Assignments and Preferences Act of Ontario, and as such had acted in administering the estate, the assets of which had come into his hands. Then proceedings for winding up the company under the Winding-up Act of Canada were taken, the result of which, so far as Henderson and these appellants are concerned, must be taken to be that from the date of the order of the 16th of March, 1898, hereafter referred to, the assignment under the Provincial Act was superseded. Henderson's powers as assignee were at an end, and from the time his appointment as liquidator took effect, his relation to the estate was in the quality of liquidator only, and the appellants were security for him as such. The terms of their obligation are: that if Henderson do and shall obey all lawful orders of the Court in respect of the winding-up of the company, and shall duly account for *what he shall receive or shall become liable to pay as liquidator* of the property, estate and effects of the company at such period and in such manner as the Court or the Master in Ordinary shall direct, then the obligation shall be void.

Henderson thereafter actually transferred to his account as liquidator in the bank a sum of \$7,752.31, part of the assets of the estate in his hands, and for this sum, which he afterwards appropriated to his own use, the appellants are undoubtedly liable under their bond, unless some objection other than that with which I am now dealing is entitled to prevail. He had also received as assignee, and had in his hands when his appointment as liquidator took effect, the further sum of \$1,794, which, if the \$1,400 afterwards transferred to his account as liquidator on the 28th of May, 1898, be not part of it, he never transferred to that account, although he was and still is debtor to the estate in respect of it, and the question is



whether under the terms of their bond the appellants are liable in respect of this sum.

The respondents rely upon the order of the Divisional Court, made on the 16th of March, 1898, which is recited in the bond, by which, among other things, it was ordered that the winding-up of the company should be proceeded with under a former order of the 11th of January, 1898, proceedings under which had been stayed until further order. Following this is the further direction that the said E. J. Henderson, as assignee for the benefit of creditors of (the company), do forthwith on the appointment of an interim or permanent liquidator of the said company, deliver over to the interim or permanent liquidator of the said company all the assets and effects, books of account, papers and documents of the said company now in his possession, and do account to the liquidator of the company for all the assets and effects which may have come into his possession as assignee of the company.

Henderson was a party to the action and matter in which this order was made. It was made on notice to him, and, as I have said, is recited in the appellants' bond.

The \$1,794 in question was actually in his hands as assignee when his appointment as liquidator took effect, and the Master in Ordinary, on taking his accounts as such, charged him therewith with the other moneys, which he had also misappropriated, after they had been transferred to his liquidator's account, and ordered him to pay it over to his successor in office.

The appellants' contention is that Henderson never received this sum as liquidator, but always held it as assignee of the estate, and was a mere debtor or defaulter in the latter capacity, for whose omissions, debts, or defaults the appellants are not liable.

With this contention I cannot agree. Whatever merit there might have been in it, if Henderson had been a defaulter in respect of this fund when the appellants' bond took effect, it is devoid of force as applied to the facts. The fund was in existence then and afterwards, though it may have been standing in the bank at Henderson's credit as assignee, or simply at the credit of his private account, and in either case it became

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his property as liquidator of the estate on the completion of his appointment as such, and he was liable as liquidator under the terms of the bond to pay it when ordered to do so. And whatever may have been the account to the credit of which it was standing when he became liquidator, the moment he drew it out of that account he necessarily received it as liquidator within the terms of the bond. It could not be otherwise. His breach of duty in not depositing it to the credit of the liquidator's account could not absolve the defendants or entitle them to say, that until he did so he did not receive it as liquidator. Security given on behalf of a liquidator is not of so illusory a character as this contention, if well founded, would make it out to be. The liability of a surety is doubtless not to be extended by implication or construction, but in the present case I think that which is sought to be impressed upon the appellants comes within the very terms of their obligation.

I refer to *Myers v. United States* (1839), 1 McLean 493; *Farrar v. United States* (1831), 5 Peters 372; *United States v. Boyd* (1841), 15 Peters 187.

The remaining objections to the judgment amount only to this, that the Court had no jurisdiction to make the winding-up order so as to affect the administration of the trusts of the assignment. I do not assent to the soundness of this objection, but I think it is not open to the appellants. The orders made stand unreversed, and they entered into their bond on the footing of their being valid orders. And the winding-up proceedings have been carried on by the liquidator on that footing, and the liquidator's appointment was confirmed on the faith of the security offered by the appellants.

I think the appeal was competent, disagreeing with the respondents' contention in that respect, but I think that it must be dismissed with costs.

MACLENNAN, and LISTER, JJ.A., and LOUNT, J., concurred.

*Appeal dismissed.*

R. S. C.

[IN CHAMBERS.]

PHILLIPS V. MALONE ET AL.

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*Writ of Summons—Service out of Jurisdiction—Rule 162 (e)—Contract—Place of Performance—Quebec Law—Discretion.*

June 18.  
Dec. 23.

An agreement between the plaintiff and defendants provided for the purchase by the defendants, who resided and carried on business in Montreal, in the Province of Quebec, from the plaintiff of certain plant and machinery and stock in trade of a business carried on by him at Montreal. A part of the stock in trade was not at once to be purchased, and provision was made that it was to be held by the defendants on consignment, and sold by them for and on account of the plaintiff; and that if at any time the plaintiff should be willing to sell to the defendants this part of the stock, or any portion thereof, the defendants should purchase the same at the stock price thereof. The agreement was signed by the plaintiff in Toronto, in the Province of Ontario, and afterwards by the defendants in Montreal. The plaintiff sued for the price of the goods referred to in the latter part of the agreement, alleging that he had elected to sell the goods to the defendants, and had notified them of his willingness to do so, whereupon they became liable to pay him the price:—

*Held*, that the contract was made in Montreal, and the obligations arising out of it were to be governed by the law of Quebec, according to which the domicile of the debtor is the place of payment, and therefore the action was not founded on a breach within Ontario of a contract to be performed within Ontario, and service of the writ of summons out of Ontario should not be allowed: Rule 162 (e).

In another view, the obligation to pay did not arise directly from the provisions of the agreement, but in order to make it complete there must have been an election to sell, and notice thereof to the defendants, and, as a notice of the election was given by letter received by the defendants in Montreal, there was another difficulty in the way of the plaintiff.

Having regard to all the circumstances and to the fact that the defendants were not possessed of any property in Ontario which could be reached by process upon a judgment recovered in this action, a proper discretion was exercised in setting aside the order allowing service of the writ out of Ontario.

*Comber v. Leyland*, [1898] A.C. 524, referred to.

THE defendants, having been served with a writ of summons and order allowing the issue of such writ for service out of the jurisdiction, moved to set the same aside as having been improperly allowed. The facts are stated in the judgments.

The motion was heard by the Master in Chambers on the 7th June, 1901.

*George Kerr*, for the defendants.

*J. A. Worrell*, K.C., for the plaintiff.

June 18. THE MASTER IN CHAMBERS:—The action is brought by the plaintiff for the recovery of \$267.78, a balance

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claimed to be due from the defendants under an agreement for the sale of certain goods, etc., entered into by the parties hereto on the 1st May, 1899.

The plaintiff, although a resident of Toronto, had been carrying on a manufacturing business of moulding, etc., and dealing in pictures, under the name of C. R. Phillips & Co., in the city of Montreal, from 1894 until he sold out the same to the defendants on the 1st May, 1899, as per the above referred to agreement.

Under the agreement the plant and machinery were sold for the sum of \$436, payable in the city of Toronto on or before the 4th May, 1901.

The goods and chattels described in the second schedule to such agreement were sold at and for the price or sum of \$3,694, as follows: \$1,000 on or before the execution of the agreement; \$200 on or before the 4th October, 1899; \$250 on or before the 4th December, 1899; \$500 on or before the 5th March, 1900; \$400 on or before the 4th June, 1900; \$450 on or before the 4th September, 1900; \$450 on or before the 4th December, 1900; and \$444 on or before the 4th March, 1901. No place of making these payments was mentioned.

And as to certain goods mentioned in the third schedule, it was agreed that the defendants should hold the same as consignees for and on account of the plaintiff, to be sold by the defendants for and on account of the plaintiff, "and the proceeds to be accounted for on demand to the party of the first part," the plaintiff herein. And it was thereby agreed as follows:—"And it is further agreed that if at any time and from time to time after the 1st day of May, 1900, the party of the first part shall be willing to sell to the parties of the second part the goods set out in the said third schedule, or any part thereof, then the said parties of the second part shall purchase the said goods or such part thereof as the party of the first part shall be willing to sell them, at the stock price thereof, and payment therefor shall be made at such dates, spread over one year from the first day of May, 1900, as shall be agreed upon." And the defendants covenanted not to remove these goods from the premises at which they carried on business in the city of Montreal without the written consent of the plaintiff.



In or about the month of November, 1899, the defendants, at the request of the plaintiff, shipped the goods so held by them on consignment to the Cobban Manufacturing Company, Toronto. The reason for doing this was to secure the Cobban Manufacturing Company for the account which had been transferred by the plaintiff to that company—he being a vice-president of the same.

At the time of such shipment the plaintiff dictated the following letter and obtained the defendants' signature to the same, viz.:—

“ Montreal, 7th November, 1899.

“ Messrs. Cobban Manufacturing Co., Limited,  
“ Toronto.

“ Gentlemen—Referring to the lot of M. H. & C. engravings and other pictures shipped you out of the lot held on consignment by us and mentioned in agreement to purchase from C. R. Phillips & Co., we agree that this sending does not affect the agreement in any way and that you may ship back such portion as may remain unsold at any time you wish, but not to be charged to us except on terms mentioned in agreement.

“ Malone & Robertson.”

The defendants having paid the amounts of their indebtedness to the plaintiff as the same became due, the plaintiff, apparently without informing the defendants of his intention, shipped back the goods referred to in the above letter to the defendants in the month of December, 1900.

To this the defendants objected, but finally agreed to carry out their original agreement as to the stock originally described, and gave the plaintiff their note at four months and due on the 4th May, 1901, for \$266 to cover the same, and disputed the balance of the account or \$267.78, the amount in suit herein, on the ground that they were not the goods they had agreed to purchase.

Thereupon the plaintiff brought the present action, and obtained an order allowing him to serve the writ of summons out of the jurisdiction.

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Considerable evidence has been taken as to where the breach of the contract took place; the plaintiff stating in his affidavit that "the said balance should have been paid in accordance with the said agreement in the city of Toronto, where I reside and carry on business, on or before the 4th day of May, 1901, but the same has not been paid, nor any part thereof."

The facts as to the payments of the goods and chattels sold for the \$3,694 are that the whole of this sum was paid by the defendants in Montreal. The cash payment of \$1,000 seems to have been handed to the plaintiff in Toronto, but it was a cheque on the Bank of Montreal in Montreal, and was there paid; and this was also the case of the payment on the 27th September, 1899, of \$200, while, as to the remaining payments, the plaintiff states that the notes for same were, at his request, drawn by the secretary of the Cobban Manufacturing Company in favour of that company, and all made payable at 1803 Notre Dame street, Montreal, the place of business of the defendants.

These notes were accepted by the plaintiff without objection. The note for the plant and machinery, however, contained a sum for commission, which the defendants paid, as under the agreement it was payable in Toronto. The note for the amount paid by the defendants for the goods consigned was also made payable in Montreal, so that, so far as the circumstances surrounding the agreement would indicate, it was agreed that the place of payment of these moneys was Montreal.

The agreement does not bear out the statement in the plaintiff's affidavit that the "balance should have been paid in accordance with the said agreement in the city of Toronto."

The goods when sold were in Montreal. The agreement, although drawn up in Toronto and signed by the plaintiffs here, was not finally settled until the defendants and the representative completed the schedule and prices in Montreal.

The Rule under which the plaintiff obtained the order allowing the service of the writ is 162 (e), which provides that the service may be allowed wherever—"The action is founded on a breach within Ontario of a contract wherever made, which is to be performed within Ontario."

There is no doubt that part of the agreement of the 1st May, 1899, was to be performed in Ontario, namely, the pay-

ment of the \$436 for the plant and machinery, but I take it that it is not sufficient that a part only of the contract is to be performed within the jurisdiction in order to come within the Rule, unless there is a breach of that part of it within the jurisdiction. The breach here is in connection with the payment of goods sold and as to which the agreement is silent as to the place of payment.

Referring to the language used by Lord Justice Lindley in *Rein v. Stein*, [1892] 1 Q.B. 753, at p. 758, I think it would apply to the present case. He says: "I should infer that payment was to be made in London from the circumstances existing at the time when the letters were written, but it does so happen that the course of business pursued by the defendant since the dates of those letters leads to the inference that part of the defendants' duty under this contract was to pay the plaintiffs in England."

So here the inference to be drawn from the course of business pursued by the plaintiff and defendants with reference to the payment for the goods sold is that payment was to be made in Montreal, and not within the jurisdiction of this Court.

In my opinion, the case of *Robey v. Snaefell Mining Co.* (1887), 20 Q.B.D. 152, does not apply, but that the principles laid down in *Bell v. Antwerp, etc., Line*, [1891] 1 Q.B. 103; *Thompson v. Palmer*, [1893] 2 Q.B. 80; *The Eider*, [1893] P. 119—see also *Bell v. Villeneuve* (1895), 16 P.R. 413, and *Empire Oil Co. v. Vallerand* (1895), 17 P.R. 27—should be adopted and followed here.

The order will go as asked, with costs to be paid by the plaintiff.

The plaintiff appealed from the order of the Master, and his appeal was heard by MEREDITH, C.J.C.P., in Chambers, on the 18th October, 1901.

The same counsel appeared.

December 23. MEREDITH, C.J.:—This is an appeal by the plaintiff from an order of the Master in Chambers, dated the 18th June, 1901, setting aside the order made by him on the 7th May, 1901, giving leave to issue and serve out of Ontario

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a writ of summons in this action, and the service effected thereunder on the respondents at Montreal.

The appellant's claim is for the price of goods, and is based upon one of the provisions of an agreement, bearing date the 1st May, 1899, made between him and the respondents.

The agreement provides for the purchase by the respondents, who reside and carry on business in Montreal, from the appellant of certain plant and machinery and certain stock in trade of a business which was then carried on by him at Montreal. A part of the stock in trade was not at once to be purchased, and provision is made that it is to be held by the respondents on consignment, and to be sold by them for and on account of the appellant; it is further provided with regard to this part of the stock as follows:

"And it is further agreed that if at any time and from time to time after the 1st of May, 1900, the party of the first part (the appellant) shall be willing to sell to the parties of the second part (the respondents) the goods set out in the third schedule or any part thereof then the said parties of the second part shall purchase the said goods or such part thereof as the party of the first part shall be willing to sell to them at the stock price thereof and payment therefor shall be made at such dates spread over one year from the 1st day of May, 1900, as shall be agreed."

The appellant's contention is, that, having elected to sell the goods mentioned in the third schedule to the respondents, and having notified them of his willingness to do so, they thereupon became liable to pay him the price of them, ascertained as provided by the agreement, and it is for the recovery of that price that he brings his action.

The agreement was signed by the appellant in Toronto, but it did not become a completed instrument until it was executed by the respondents, and the execution of it by them took place in Montreal. It was therefore a contract made in Montreal.

Whether or not the High Court of this Province has jurisdiction to entertain the application depends upon its being shewn that the part of the agreement for breach of which the action is brought was to be performed in Ontario, and that the breach also occurred in Ontario, and that in turn it depends upon the

interpretation to be given to the agreement as to the place where payment was to be made, there being no express provision in the agreement as to it.

If, as contended by Mr. Worrell, the place of payment was the residence of the appellant, it was so only because the interpretation of the agreement is governed by Ontario law, for, according to the law of Quebec, the domicil of the debtor is the place of payment. It is, in my opinion, the law of Quebec that is to govern as to the obligations arising out of the agreement, the *lex loci contractus* being the appropriate law for determining the nature, the obligation, and the interpretation of a contract: Dicey, p. 570 *et seq.*

I have assumed thus far that the obligation to pay arises directly from the provision of the agreement which I have quoted, but it is, I think, very doubtful if it does. In order to make complete the obligation to pay, there must have been an election to sell and notice of that election to the respondents, and the notice of the election was given by letter which was received by the respondents in Montreal. This puts another difficulty in the way of the appellant, which is, I think, insurmountable.

Having regard to all the circumstances and to the fact that the respondents are shewn not to be possessed of any property in this Province which could be reached by process upon a judgment recovered in this action, the Master in Chambers, I think, properly exercised his discretion in setting aside the order allowing service of the writ out of Ontario.

I refer to *Comber v. Leyland*, [1898] A.C. 524.

I affirm the order appealed from and dismiss the appeal with costs.

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## [DIVISIONAL COURT.]

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Jan. 3.

## RE JONES V. BISSENETTE ET AL.

*Practice—Writ of Summons—Service out of Jurisdiction—Order before Action—Parties—Causes of Action—Joinder—Rules 120, 128, 162 (g), 164.*

The proper practice under the Rules as they stand (Rules of 1897 Nos. 120, 128, 164) is to obtain, before the issue of the writ of summons, an order fixing the time for appearance to be inserted in the writ proposed to be issued, and allowing it to be served out of the jurisdiction.

Where the affidavit filed on an application for such an order shewed that the cause of action alleged against three of the defendants, one of whom lived in Ontario, was the causing an information to be laid against the plaintiff in Quebec and the plaintiff to be arrested upon a warrant in Ontario by the fourth defendant, and taken to Quebec and prosecuted there upon a criminal charge, of which he was acquitted, and that against the fourth defendant the unnecessary and unjustifiable handcuffing of the plaintiff in Ontario:—*Held*, that the plaintiff was not entitled to join the fourth defendant with the other three, the causes of action being separate and having nothing to do with each other.

*Held*, also, that, as one of the three remaining defendants lived in Ontario, and it was alleged that he joined in the laying of the information, he was a proper party to the action, within the meaning of Rule 162 (g), and an order should be made for the issue and service of the writ upon the other two in Quebec.

*Croft v. King*, [1893] 1 Q.B. 419, followed.

But the order should contain a condition that in case the action should be dismissed as against the defendant in Ontario, the plaintiff should consent to its dismissal as against the other defendants as well.

THIS was an *ex parte* application on behalf of the plaintiff in an intended action for leave to issue a writ of summons for service out of the jurisdiction upon the proposed defendants other than the defendant Gibbons. The application was referred by the Master in Chamber to a Judge in Chambers, and by a Judge in Chambers to a Divisional Court.

The proposed defendants were Adolphe Bissonnette, Frank L. Benedict, Henry Miles, and J. J. Gibbons. The affidavit on which the application was made was by the plaintiff, and set forth that the defendants other than Gibbons lived in the city of Montreal, and that the defendant Gibbons lived in the city of Toronto; that the three defendants other than Bissonnette conspired together with the intent to cause the plaintiff to desist from the manufacture of a certain article called “carbo-creo,” and as the result that the said three defendants caused the defendant Benedict to lay an information at Montreal against him, the plaintiff, and another, charging them with having uttered a



certain forged certificate, knowing it to be forged, and afterwards caused the defendant Bissonnette to arrest the plaintiff at Toronto under a warrant, and caused him to be there imprisoned and afterwards caused him to be taken to Montreal and to be prosecuted for the said alleged offence there; that the said Bissonnette, after the plaintiff's arrest in Toronto, handcuffed him there without any just cause, and took him so handcuffed from Toronto to Montreal; and that he was acquitted upon being tried for the said alleged offence in Montreal.

The motion was heard by a Divisional Court composed of STREET and BRITTON, JJ., on the 5th November, 1901.

W. R. Riddell, K.C., for Jones, asked the Court to overrule *Oigny v. Beauchemin* (1895), 16 P.R. 508, where such an order as was asked for here was set aside upon a similar state of facts with regard to the cause of action. He contended that the action was founded on a tort committed in Ontario, within the meaning of Rule 162 (e), citing *De Bernales v. Bennett* (1894), 10 Times L.R. 419; or that the case fell within Rule 162 (g), citing *Massey v. Heynes* (1888), 21 Q.B.D. 330; *Chance v. Beveridge* (1895), 11 Times L.R. 528; *Croft v. King*, [1893] 1 Q.B. 419.

January 3. The judgment of the Court was delivered by STREET, J.:—I was under the impression at the close of the argument that the omission from our Rules of the English Order II., Rule 4\*, had rendered it unnecessary for a plaintiff to obtain leave to issue a writ for service out of the jurisdiction, and that the practice was to issue it first and then to obtain leave to serve it out of the jurisdiction. I learn, however, from the officers of the High Court at Osgoode Hall that the practice has been to require an order giving leave to issue the writ in the first place; and I am of opinion that the proper practice under the Rules as they stand is, to obtain an order fixing the time for appearance in a writ proposed to be issued and allowing it to be served outside the jurisdiction, before the writ is issued. Rule 120 directs that all actions shall be commenced by the issue of a writ of summons, which shall contain,

\*“No writ of summons for service out of the jurisdiction . . . shall be issued without the leave of the Court or a Judge.”

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amongst other particulars, the time within which the defendant is to enter his appearance. By Rule 128 a special form of writ is prescribed for service out of Ontario, and the form given in the appendix under this Rule requires the insertion in the writ of the number of days allowed for appearance by the order allowing service; and Rule 164 directs that the order allowing service out of the jurisdiction shall limit the time for entering appearance. It is evident, therefore, that, before any such writ can be issued, it is necessary to obtain an order limiting the time for appearance, which order must also give leave to serve the writ out of the jurisdiction.

Upon the merits of the case as disclosed in the affidavit filed, I am of opinion that the plaintiff is not entitled to join Bissonnette as a defendant with the other defendants, for the reason that the only cause of action alleged against him is the trespass complained of in handcuffing the plaintiff in Toronto after his arrest there; the other defendants are charged with malicious prosecution only, and they are not responsible for the improper act of the officer executing the warrant: *Hamilton v. Massie* (1889), 18 O.R. 585. There are, therefore, two separate causes of action sought to be joined here, one for malicious prosecution against Benedict, Miles, and Gibbons, with which Bissonnette has nothing to do, and one for trespass against Bissonnette, with which the other three have nothing to do; and these cannot be joined in one action: *Gower v. Couldridge*, [1898] 1 Q.B. 348; *Smurthwaite v. Hannay*, [1894] A.C. 494; *Mooney v. Joyce* (1896), 17 P.R. 241; *Faulds v. Faulds* (1897), *ib.* 480.

The plaintiff is entitled, I think, to an order for leave to issue a writ for service out of the jurisdiction upon the defendants Benedict and Miles, joining with them in the action the defendant Gibbons, who is charged in the affidavit as having been one of the persons who caused and procured the information to be laid, and who is resident within the jurisdiction. It is the fact that he resides within the jurisdiction, and that, upon the allegation in the affidavit of his participation in the laying of the information, he is a proper party to the action, that justifies us in making the order for the issue and service of the

writ upon the other parties under sub-sec. (g) of Rule 162\* :  
*Croft v. King*, [1893] 1 Q.B. 419.

In case the plaintiff should fail in his action against the defendant Gibbons, then his only justification for the bringing of this action will be shewn to have had no existence, and the order now to be issued giving leave to serve the other two defendants out of the jurisdiction should contain a condition that in case the action be dismissed against Gibbons, the plaintiff will consent to its dismissal as against the other defendants as well.

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\*162—(1) Service out of Ontario of a writ . . . may be allowed . . .  
 wherever:—

(g) A person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario.

[IN CHAMBERS.]

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BAGSHAW V. JOHNSTON ET AL.

Dec. 23.

*Lien—Mechanic's Lien—Statutory Action to Realize—Joining Other Causes of Action—Parties—Architect.*

In an action begun under sec. 31 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897 ch. 153, by the filing of a statement of claim, to realize a lien created by the Act, the plaintiff cannot include other causes of action and other matters.

Where the plaintiff in such an action claimed to be entitled to a lien against the owner of land who had erected a building thereon, and joined as a defendant the architect of the building, whom he charged with fraudulently refusing to give a certificate for the amount which the plaintiff claimed to be entitled to recover, and asked that the architect might be ordered to pay the amount claimed, with damages for his fraudulent breach of duty, and the costs of the action, the name of the architect was struck out.

*Seem*, that, as against the owner, the claim to a proper certificate might be maintained in this action as one of the matters involved in the claim to a lien.

MOTION by the defendant Siddall to strike out his name from the proceedings in an action brought to realize a lien under the Mechanics' Lien Act, R.S.O. 1897 ch. 153. The plaintiff claimed to be entitled to a lien under the Act upon land owned by the defendant Johnston, who had erected a building thereon; the defendant Siddall was the architect, and was charged by the plaintiff with having fraudulently refused to give a certificate for the amount which the plaintiff claimed. The action was begun, under the Act, by the filing of a statement of claim, in which the plaintiff asked that the defendant Siddall might be ordered to pay the amount claimed, with damages for his fraudulent breach of duty, and the costs of the action. Upon the argument of the motion the plaintiff offered to waive his claim for damages and for the amount of his bill, as against the defendant Siddall.

The motion was heard by STREET, J., in Chambers, on the 23rd December, 1901.

*James McBride*, for the defendant Siddall.

*D. C. Ross*, for the plaintiff.

*T. T. Rolph*, for the defendant Johnston.

December 23. STREET, J.:—This action is begun under the 31st section of ch. 153, R.S.O., and, in so far as it is directed against the owner Johnston, I see no reason at present why it should not be maintained and be determined, even although the right to succeed in it depends upon whether the plaintiff can make out that a proper certificate has been fraudulently withheld from him. That is one of the matters involved in the plaintiff's claim to a lien, and it can therefore be tried in an action brought under the Act. In order to distinguish actions brought under the Act from other actions in the High Court, the former are begun by filing a statement of claim, and the scope of actions so begun is limited to the realizing of the liens created by the Act; such actions may be tried before a number of judicial officers who have no jurisdiction to try ordinary actions in the High Court except by consent of the parties. Upon this account it would be improper to allow other causes of action and other matters than actions to realize liens and the questions arising in actions coming strictly within that description to be included with them, for the defendants are then deprived of their right to trial before the ordinary tribunals.

The defendant Siddall is charged in the present action with fraud, and, although the claim to damages made in the statement of claim has been abandoned, he is still retained as a party and costs are claimed against him. He is not a necessary party to an action to realize a lien, for he is neither a contractor nor a wage-earner, nor one who has supplied materials, nor is he an owner or incumbrancer. He is merely the architect for the work. If the plaintiff wishes to proceed against him, he is of course at liberty to do so, but he must not do so under the Mechanics' Lien Act, for no power is given to join such a claim under that Act.

There will therefore be an order striking out his name as a defendant, with his costs to be paid by the plaintiff.

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## [DIVISIONAL COURT.]

D. C.

1901

Dec. 14.

KIDD ET AL. V. HARRIS ET AL.

*Marriage—Widow of Deceased Brother—Validity—Legitimacy—Presumption—Will.*

The testator was married on the 30th June, 1855, to the widow of his deceased brother ; she survived the testator. In 1884 and 1885 the testator was living with another woman as his wife :—

*Held*, that the validity of the marriage between the testator and the widow of his deceased brother could not be disputed after the death of the testator ; and the presumption arising from the testator's relationship with another woman was rebutted by the fact of his lawful wife being then alive ; and the appellants, the children of the testator and the other woman, were not legitimate and had no locus standi to appeal from a judgment establishing a document as the will of the testator.

*Hodgins v. McNeil* (1862), 9 Gr. 305, and *Re Murray Canal* (1884), 6 O.R. 685, approved.

APPEAL by the defendants John Harris and Charles Harris to the Divisional Court from a judgment of Ferguson, J., declaring the will of Hebron Harris, propounded by the plaintiffs, the executors named therein, to be valid. The defendants had filed a caveat, and the plaintiffs thereupon propounded the will, and made the defendants and all the next of kin of the deceased, as well as all the persons interested under the will, parties defendants in the action, which was removed from a surrogate court into the High Court.

The present appellants by their statement of defence stated that they were the lawful sons of the testator, and that the testator at the time of the making of his said will was not of sound mind, memory, and understanding, and that the making of the will was obtained by undue influence. The infant defendants by their statement of defence did not admit the making of the will, and put the plaintiffs to proof of its due execution. The other defendants did not dispute the validity of the will. The plaintiffs joined issue upon all the statements of defence.

The action was tried before Ferguson, J., at Ottawa on the 29th April, 1901, in the presence of counsel for all parties. Evidence was given on both sides, *vivâ voce* and under commission, shewing the circumstances under which the will was executed and the state of health of the testator at the time.

The plaintiffs were also allowed to go into evidence as to the legitimacy of the defendants John and Charles Harris, the present appellants, by putting in the evidence of Elizabeth Harris taken under a commission, and in reply the defendant Charles Harris was sworn, and stated that the testator was his father; that his mother's maiden name was Sarah Magee; and that his father and mother had lived together as man and wife in Kingston; that they had three children, of whom he was one; that he was born in 1876; that his father and mother had ceased to live together in 1885, and had never since lived together, but that he had sent her money since; that his brother John was born in 1870; and his sister, since deceased, in 1878; that his mother was always known and addressed as Mrs. Harris; and that he could not remember seeing his father before the year 1884.

The evidence of Elizabeth Harris, taken on commission, shewed that she had been first married on 16th March, 1834, to Daniel Harris, an elder brother of the testator, and that after his death she was again married in the State of New York to the testator, both she and the testator being at that time domiciled in this Province; that she had lived for some time with the testator as his wife; and that he had always continued to pay her friendly visits, although he had gone off in the meantime with Sarah Magee, the mother of John and Charles Harris, the present appellants.

The learned Judge gave judgment in favour of the validity of the will, but did not deal with the question of the legitimacy of the present appellants.

The only appeal was by John and Charles Harris.

The appeal was argued on the 8th November, 1901, before a Divisional Court (FALCONBRIDGE, C.J.K.B., and STREET, J.)

*E. H. Smythe*, K.C., for the appellants.

*G. E. Kidd*, for the plaintiffs.

*A. Haydon*, for the specific legatees.

*W. Morris*, for other parties.

December 14. The judgment of the Court (stating the facts as above) was delivered by STREET, J.:—It was pointed out to

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the counsel for the appellants that, unless his clients, John and Charles Harris, were legitimate children of the testator, they had no *locus standi* to appeal.

There seems to be no doubt that the testator was lawfully married on the 30th June, 1855, to Elizabeth Harris, who was the widow of Daniel Harris, the deceased brother of the testator, and that she is still living. This does away with any presumption arising from the fact that in 1884 and 1885 the testator was living with another woman as his wife, and counsel for the appellants sought only to rely upon the alleged invalidity of the marriage between a man and the widow of his deceased brother.

Such a marriage, however, comes within the rule laid down in *Hodgins v. McNeil* (1862), 9 Gr. 305, and *Re Murray Canal* (1884), 6 O.R. 685, and the validity of such a marriage, after the death of one of the parties to it, is too well established in this Province to be now disputed. I adopt as satisfactory the reasoning upon which those two cases proceed, and there is therefore no ground upon which it can be held that the subsequent cohabitation of the testator with Sarah Magee can be allowed as evidence of a marriage between them.

It is unnecessary that we should consider any of the other questions which the appellants have attempted to raise upon this appeal, for they have no *locus standi* to raise them.

The appeal should be dismissed with costs.

T. T. R.

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[IN CHAMBERS.]

CLERGUE V. MCKAY ET AL.

1901

Nov. 14.

*Discovery—Affidavit on Production—Dual Relationship of Solicitor—Privilege.*

Where it appeared that certain letters had passed between the defendant in an action and his solicitors therein, who had also acted as his real estate agents, and that in his affidavit on production, he had claimed privilege for such letters:—

*Held*, that the plaintiff was entitled to a further affidavit, setting forth and distinguishing what communications had taken place between him and his solicitors as such, and as real estate agents, in order to claim privilege for the former, as the latter were not privileged.

*Moseley v. The Victoria Rubber Co.* (1896) 55 L.T.N.S. 482, followed.

MOTION by the plaintiff for a further and better affidavit on production in respect to certain letters which had passed between the defendant Preston and a firm of solicitors which he claimed were privileged from production as communications between himself and his solicitors, who had also acted for him as agents for the sale of the property in question in the action.

The motion was argued before the Master in Chambers on the 11th of November, 1901.

*R. U. McPherson*, for the plaintiff.

*W. M. Douglas*, K.C., for defendant Preston.

Judgment was delivered on the 14th November, 1901.

THE MASTER IN CHAMBERS:—An action for specific performance of an agreement to sell certain lots in the town of Sault Ste. Marie, brought by a purchaser against the vendors

The usual order for production was obtained by plaintiff, and the defendant Preston thereupon filed his affidavit on production.

In it he objected to produce letters set forth in the second part of the first schedule thereto, and numbered from 4 to 12, both inclusive, "on the ground that they are communications between myself and my solicitor, and as such are privileged from production."

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The plaintiff thereupon moved for a further and better affidavit on production on the ground that these documents are not so privileged; the defendant obtained an enlargement of the motion, and files a further affidavit in which he still objects to produce the documents in question, "on the ground that they are communications passing between myself and my solicitors, Hearst & McKay, with reference to matters which are now in question in this case, and that the same are confidential communications between solicitors and client, and as such are privileged from production."

Had there been no other evidence before me than these affidavits and pleadings, I would have considered myself bound by the decision in *Hoffman v. Crerar* (1897), 17 P.R. 404, where Mr. Justice Street reluctantly followed the decision in *Hamelyn v. Whyte* (1874), 6 P.R. 143, but it appears from a letter produced by the plaintiff's solicitor, and written by the defendants' solicitors, Hearst & McKay, that they were acting as agents for him in the sale of the property in question, and there is no doubt it is because of this fact that the plaintiff is more anxious to obtain the production of the letters in question than he would otherwise have been.

In *Moseley v. The Victoria Rubber Co.* (1896), 55 L.T.N.S. 482, it was held, that the plaintiff's answer as to documents was insufficient, inasmuch as it did not distinguish communications between himself and his solicitor, as such, and communications between himself and his solicitor in his character of patent agent, communications of the former class alone being privileged. In delivering judgment, Mr. Justice Chitty, at p. 485, says: "The plaintiff, in his answer to interrogatories, has claimed that certain documents, which he mentions, are confidential communications between himself and his solicitor and counsel and therefore privileged. I should be very much disposed, if this were an ordinary case, to say that that was not a sufficient claim for privilege. It is not necessary exactly to decide that point; but I think that the defendants, who are interrogating, have a right to a better answer in the circumstances of this particular case. It is admitted . . . that the solicitor intended to be referred to is also a patent agent. It is quite clear, I need not say, in point of law, that



communications between a man and his patent agent are not privileged. Therefore, seeing the nature of this correspondence which is referred to, and seeing the double character which the plaintiff's solicitor occupies, it appears to me that the defendants are entitled to an answer more precise. . . . The statement is 'confidential communications between myself and my solicitor.' But he does not state that these communications took place between the plaintiff and his solicitor in that relation one to the other. It may be that the communication took place in the other relation, that of patent agent. The communication is between the plaintiff and a person standing in two relations towards the plaintiff."

That is exactly the position in which the defendant Preston and his solicitors stand towards each other herein, namely, that of real estate agents and of solicitors, and, as was held in *Moseley v. Victoria Rubber Co.*, a further affidavit should be made setting forth and distinguishing what communications took place between the defendant and his estate agents, and what took place between him and his solicitors, seeing that the estate agents and solicitors are the same persons. I will adjourn the motion for two weeks to enable the defendant to file such an affidavit.

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[MEREDITH, J.]

1901

Nov. 13.

MADILL

V.

## THE CORPORATION OF THE TOWNSHIP OF CALEDON.

*Way—Highway—Sidewalk thereon Built by Voluntary Subscription and Statute Labour—Liability of Municipality to Repair.*

A township municipality was held liable in damages for an injury arising through the non-repair of a sidewalk on a highway within its limits, notwithstanding the fact that the sidewalk was built by voluntary subscription and statute labour, and although the municipality never assumed any control over it nor was any public money or statute labour expended on it with the knowledge of the council, where the latter was aware of the existence of the sidewalk and there has been opportunity and time to repair it.

THIS was an action brought against the corporation of the township of Caledon for injuries sustained by the plaintiff in falling into a hole in a sidewalk on a highway in an unincorporated village within the limits of the defendant township.

The facts appear in the judgment.

The action was tried at Brampton on October 31, 1901, before MEREDITH, J., without a jury.

*E. E. A. DuVernet* and *W. D. Henry* for the plaintiff contended that want of repair constituted a nuisance; that the corporation were liable because municipal moneys were expended on the sidewalk; citing *Biggar's Mun. Man.*, sec. 606 at p. 825; *Boyle v. The Corporation of the Town of Dundas* (1875), 25 C.P. 420; *Badams v. City of Toronto* (1896), 24 A.R. 8; *Gordon v. The City of Belleville* (1887), 15 O.R. 26.

*E. F. B. Johnston*, K.C., and *E. G. Graham*, for the defendants, contended that there was no necessity or public demand for the sidewalk, and no municipal money was appropriated for it; that the travelled way was sufficient accommodation for the public; that if statute labour was expended on it, it was without authority, and that the municipality had not accepted the sidewalk; citing *Regina v. The Corporation of the Village of Yorkville* (1872), 22 C.P. 431;

*In re McBride and the Corporation of the Township of York* (1871), 31 U.C.R. 355; *O'Connor v. The Township of Otonabee* (1874), 35 U.C.R. 73; *Foley v. East Flamboro'* (1899), 26 A.R. 43.

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November 13. MEREDITH, J.:—The sidewalk has been there for about twenty years. The requirements of the locality caused it to be built, and have since caused its maintenance. It is situated in what was, at the time of the plaintiff's injury, an unincorporated village of five hundred or six hundred inhabitants.

It cannot, upon the evidence adduced at the trial, be said that the council of the defendants ever assumed any actual control over the walk, or that any municipal moneys were ever expended upon it with the knowledge of the council. It seems to have been erected and maintained by voluntary contributions, and by statute labour, as to the latter it does not appear that the council had any knowledge of its being so applied, though done by and under the directions of the pathmasters.

But the walk was upon the highway—a highway which the defendants were bound to keep in repair; and it was an invitation to foot passengers to use that part of the highway for passage on foot, and it was so generally used for about twenty years before the plaintiff was injured.

She was injured while so using it, by stepping into a hole in the walk, about thirteen or fourteen inches in depth, eight or nine inches in width, and three feet in length, which had been there for several months, at least five or six.

The plaintiff cannot be found guilty of contributory negligence. She had seen the place in question once, some five or six months before; it is unreasonable to attribute negligence to her for not remembering the place of danger, and not expecting that it would so long remain unrepaired.

The sidewalk was an invitation to her to walk there; and, in its broken condition, was, to all walking there, in the dark, as the plaintiff was, a dangerous trap—a nuisance to those who had the right to use the highway, instead of being, as it seemed, an accommodation for them.

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The defendants cannot escape liability, merely because they took no active part in the construction or maintenance of the sidewalk. It was there, to the knowledge and with the acquiescence of the defendants through their council and officers, for twenty years. It was the defendants' duty to keep this highway in repair. Allowing a trap, such as that into which the plaintiff stepped, to remain so long in that highway, and in that part of it to which foot passengers would naturally go, was a breach of their duty to keep the highway in repair. It was the defendants' duty to take some care to prevent the walk becoming and remaining a source of danger—a nuisance—as it became, and was, to those who have the paramount right in the highway—the travelling public. It is no answer to a claim such as this, to say merely, that the defendants did not, but someone else did, put the highway in a dangerous state of disrepair, if there has been opportunity and time to prevent or repair the injury to the way.

There will be judgment for the plaintiff and \$475 damages, with costs of action, fixed at \$125.

G. A. B.

## [DIVISIONAL COURT.]

DAVIS ET AL.

v.

THE CROWN POINT MINING CO.

D. C.

1901

Dec. 21.

*Lien—Mechanics' Lien—Mining Location—Blacksmith—Cook.*

A blacksmith employed for sharpening and keeping tools in order for the work of mining is entitled to a lien for his wages on the mining location but a cook who does the cooking for the men employed is not.

Adjoining mining locations when they are water lots if "enjoyed" with the mining location on which the mine is situate are subject to liens for work performed on the mine.

This was an appeal from the district court of the district of Rainy River in an action brought by several lien holders against The Crown Point Mining Company to enforce their liens against the mining locations of the company.

The appeal was argued on June 12th, 1901, before a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON, and LOUNT, JJ.

*R. C. LeVesconte*, and *W. J. O'Neill*, for the defendant company, appellants, contended that the evidence did not establish the right to liens; and that in any event a cook is not entitled to a lien for his wages; that the Act should not be extended so as to include other classes of lien holders than those named, and they referred to *Larkin v. Larkin* (1900), 32 O.R. 80, and sec. 31 of The Mechanics Lien Act, R.S.O. 1897, ch. 153.

*W. N. Ferguson*, for the plaintiff, Davis, supported the liens and contended that all classes of workmen should participate in the benefit of the Act, and referred to sec. 48.

*N. W. Rowell*, and *J. H. Spence*, for other lien holders in the same interest.

*LeVesconte*, in reply.

December 21. The judgment of the Court was delivered by MACMAHON, J. (after disposing of some of the claims on the evidence):—The second objection was as to the right of J.



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Bray to a lien for \$99.75, being the amount of wages earned by him as a blacksmith, and the right of W. Harrington to a lien for \$75.62, being the amount of wages earned as cook.

The learned district Judge held on the authority of *Arnoldi v. Gouin* (1875), 22 Gr. 314, that both Bray and W. Harrington were entitled to liens.

There was no evidence given as to the character of the work done by Bray as a blacksmith. It was held by the Supreme Court of California that work done on tools or machinery used in connection with a mine is work on the mine: *Malonee v. Big Flat Gravel Mining Co.* (1888), 76 Cal. 578.

Section 4 of our Act, R.S.O. ch. 153, is very wide, as it gives to "any person who performs any work or service upon, or in respect of, . . . any building, . . . mine, etc., . . . shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building, . . . mine," etc.

The work of mining could not be carried on without tools, which would require to be constantly sharpened and kept in order by a blacksmith, and I assume from the mechanic's lien filed, he was employed for that purpose. The appeal against his claim to a lien therefore fails.

In the *Arnoldi case* the plaintiff not only drew the plans for the erection of the building, but as architect superintended its construction, and his services as a whole were performed upon or in respect to the building. And Bray's work, as I have stated, was necessary to the carrying on of the operations in working the mine.

But with regard to Harrington's right to a lien; that, I consider, stands in a different position. It was necessary that the workmen at the mine should be fed, but the cooking of food could not be regarded as "any work or service upon or in respect of the mine."

In *McCormick v. Los Angeles City Water Co.* (1870), 40 Cal. 185, the plaintiff was employed by the contractor or superintendent to cook for the men engaged in excavating the reservoir, and the cooking was done on the ground, as the work progressed. It was held that the plaintiff was not entitled to a lien. The Court said: "If any lien exists, it arises not from the place

where the cooking was done, but from the nature of the services and its relation to the work which was being constructed. If the plaintiff can assert a lien on the facts proved, he could as well have done so had the cooking been performed at any other place; and the mere fact that a person is employed to cook for labourers engaged in erecting a building entitled him to a lien the same result would follow if he had furnished the provisions also": p. 187.

The last ground argued was that no work was done and no materials provided for which liens could attach against mining locations, J.E.S. 128 and J.E.S. 129. These were water lots, and the learned district Judge held they "were enjoyed" with mining location D. 258 and therefore came within sec. 4 of the Mechanics Lien Act.

The judgment will be affirmed with the variation as to the claim of Harrington. The plaintiffs, other than Harrington, are entitled to the costs of the appeal.

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[IN CHAMBERS.]

1901

RE JELLY.

Nov. 15.

## THE PROVINCIAL TRUSTS CO. v. GAMON.

*Vendor and Purchaser—Sale under Direction of the Court—Error in Fixing Reserve Bid—Opening Biddings.*

A purchaser at a sale under the direction of the Court having no knowledge of an irregularity in fixing the reserve bid cannot be affected thereby, and a motion made to set aside a sale and open the biddings on the ground that in fixing the reserve bid the value of one part of the property was not taken into consideration was dismissed with costs.

The referee not having in his report approved of the sale but having made a special report regarding it, the purchaser although ready was unable to pay the balance of his purchase money into Court:—

*Held*, that he should be allowed to pay it in without interest and without prejudice to his right to object to the title.

THIS was a motion to set aside a sale, under the direction of the Court, of a parcel of land in an administration action, to one Thomas Bale, as purchaser, upon the ground that in fixing the reserve bid, the value of a part of the property was inadvertently omitted, and the reserve bid was consequently too low, and a cross motion by the purchaser to confirm the sale and for leave to pay the purchase money into Court. Both motions were argued together in Chambers, on November 15th, 1901, before FERGUSON, J.

*J. Bain*, for the plaintiff, contended that the property would not have been sold for such a low price if the reserve bid had been higher, and it was a mere accident not making the reserve bid higher, and as special circumstances were shewn, under Con. Rule 732, the sale should be set aside and the biddings opened: he referred to *Creswick v. Thompson* (1873), 6 P.R. 52. He also contended that the fact that infants were concerned made no difference. [FERGUSON, J.:—The Court will protect infants' rights, but will not create rights for them.]

*J. H. Moss*, for the purchaser, contended that he was a stranger to the litigation and to the proceedings under which the property was sold; and was not in any way responsible for the reserve bid; that having signed the contract and paid the deposit, he was entitled to the property on paying the balance,

which he was ready to do, but that interest should not be exacted, as the delay was not his. He referred to *McRoberts v. Durie*, 1 Ch. Ch. 211; *Mitchell v. Mitchell* (1875), 6 P.R. 232; *Griffiths v. Jones* (1873), L.R. 15 Eq. 279; *Beaty v. Radenhurst* (1871), 3 Ch. Ch. 344; *McAlpine v. Young*, 2 Ch. Ch. 171; *McDonald v. Gordon* (1867), 2 Ch. Ch. 125; *Ricker v. Ricker* (1880), 27 Gr. at p. 588; *Cottingham v. Cottingham* (1885), 11 A.R. 624.

*Wm. Davidson*, for the adult defendants in the same interest as the plaintiff.

*F. Harcourt*, for the infant defendants, cited *Jones v. Clarke* (1850), 1 Gr. 368.

November 15. FERGUSON, J.:—A motion is made to set aside the sale of parcel No. 3 to one Thomas Bale, on the ground that in making the valuation for the purpose of fixing a reserve bid, one parcel of the property was, by error, not taken into consideration, so that the reserve bid was not so large as otherwise it would have been.

The reserve bid was \$4,200. The price bid by Bale was \$5,100. He paid the deposit, and is now seeking to pay the balance of the purchase money into Court.

The argument in favour of the motion is that if the error had not taken place, the reserve bid might have been a sum greater than \$5,100, and consequently this parcel would have remained unsold. It is stated, but not proved, that this parcel was and is of greater value than \$5,100.

No offer of a larger sum is brought forward.

It appears that the biddings were fair and well conducted. No fault whatever is found with the conduct of the sale. No fault is found with the purchaser Bale, and nothing is charged against him. He knew nothing of the error or irregularity, which was wholly occasioned by those having the conduct of the sale.

It is not denied that the parcel was fairly offered for sale to the highest bidder, and Thomas Bale, without any error or fault on his part, became the purchaser.

In the case of *Griffiths v. Jones*, L.R. 15 Eq. at p. 281, James, L.J., is reported to have said: "There has been no fraud and no misconduct on the part of the purchaser; and the

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mistake, if any, was through neglect on the part of the vendors; and it is now quite clear that biddings cannot be opened except for fraud. I must hold that the contract is binding and dismiss the summons with costs."

I refer also to the case, *Dickey v. Heron*, 1 Ch. Ch., p. 149. That case and the cases cited in the judgment of the learned Vice-Chancellor shew, I think, that the error or irregularity here cannot affect the purchaser, who had no knowledge whatever of it; that the contract is good and binding; and that the purchaser is entitled to the benefit, if any, of his purchase.

After having perused the cases referred to on the argument, as well as others, I am of the opinion that this motion cannot succeed, and it is dismissed with costs to the purchaser.

The learned Referee, in making his report upon the sale, which was a sale of many parcels, did not approve of the sale of this parcel No. 3, but made a special report regarding it, and it is alleged that the purchaser has for this reason been unable to pay the balance of the purchase money into Court. I think the Referee should have reported approving of this sale, as he did in regard to the sales of the other parcels.

There is a motion by the purchaser, which may, in a sense, be called a cross motion, asking that he may be at liberty to pay into Court to the credit of this matter the sum of \$4,590, being, as he says, the balance of his purchase money of parcel No. 3, without interest, and without prejudice to his right to object to the title to the property purchased by him as aforesaid, and I am of the opinion that, in the circumstances, he is entitled to an order to this effect, with his costs of his motion.

*Order accordingly.*

G. A. B.

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## [DIVISIONAL COURT.]

## IN RE GEDDES AND COCHRANE.

D. C.

1902

Jan. 6.

*Landlord and Tenant—Lease—Renewal—Increased Rent—Arbitration.*

In a lease for twenty-one years the rent fixed was, for the first year \$106.88, for the next four years \$130 a year, for the next five years \$145 a year, and for the remaining eleven years \$178 a year. The lease contained a covenant by the lessor to renew for a further term of twenty-one years, "at such increased rent as may be determined upon as hereinafter mentioned, payable in like manner, and under and subject to the like covenants . . . as are contained in these presents." The lease provided for the appointment of arbitrators to determine the rent to be paid under the renewal lease:—

*Held*, that the arbitrators were bound to award an increased rent under the terms of the reference to them, but they might award a mere nominal increase if they thought proper; the increase was to be based upon the rent reserved for the whole term, and not for any particular year or years of it; and might be upon each year's rent or upon the average of the whole twenty-one years, but so that in the result the average annual rent should be greater for the future term than the past.

*In re Geddes and Garde* (1900), 32 O.R. 262, approved.

THIS was a special case stated under the provisions of R.S.O. 1897 ch. 62, sec. 41, being the Arbitration Act. Owing to the adverse decision in *In re Geddes and Garde* (1900), 32 O.R. 262, the lessor desired to obtain the opinion of a Divisional Court, the questions at issue being identical in principle with those decided by Rose, J., in that matter.

The case was argued on the 7th November, 1901, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ.

*H. D. Gamble*, for the lessor, referred to *Bishop v. Goodwin* (1845), 14 M. & W. 260.

*John MacGregor*, for the lessee, cited *Solly v. Forbes* (1820), 2 Brod. & Bing. 38, 49; *James v. Morgan* (1664), 1 Lev. 111; *Re Allen and Nasmith* (1900), 31 O.R. 335, 27 A.R. 536; *Re Percival* (1885), 2 Times L.R. 150.

January 6. STREET, J.:—The plaintiff is a lessor and the defendant a lessee for a term of 21 years, which has just expired. The reddendum is as follows: "Yielding and paying yearly and every year during the said term hereby granted unto the said lessor, etc., the yearly rent as follows: for the first year of the said term, \$106.88; for the next succeeding four

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years, \$130 per annum; for the next succeeding five years, \$145 per annum; for the remaining eleven years, \$178 per annum." The lease contained a covenant on the part of the lessor to renew for a further term of 21 years "*at such increased rent* as may be determined upon as hereinafter mentioned, payable in like manner and under and subject to the like covenants, etc., as are contained in these presents," etc.

Then follow provisions for the appointment of arbitrators for the purpose of determining the rent to be paid under the renewed lease. Arbitrators were duly appointed under the terms of the lease; and their award has not been made, the time for making it not having yet expired. At the request of the plaintiff, the arbitrators have stated a case, desiring to know, substantially, whether they are bound to award an increased rent irrespective of what the evidence might establish to be the present rental value of the property, and if so whether such increase should be an increase over and above the annual rent payable for the last eleven years of the term, or over the average of the annual rent payable during the whole of the term, or how otherwise.

In my opinion, the arbitrators are bound to award an increased rent under the terms of the reference to them, but they may award a mere nominal increase if they think proper. The increase is to be based upon the rent reserved for the whole term, and not for any particular year or years of it; they may make the increase either upon each year's rent or upon the average of the whole 21 years, but so that in the result the average annual rent is greater for the future term than for the past.

FALCONBRIDGE, C.J. :—The renewal clause plainly contemplates an increased rent irrespective of what the evidence might establish to be the present rental value of the premises, and the first question must be answered in the affirmative.

The increased rent should be with reference to the whole term, and not an increase over and above the annual rent payable for the last eleven years, or for any other period of the former term, and questions 2 and 4 will be answered in the negative.

The 3rd question should be answered in the affirmative. The arbitrators may, if they please, add one dollar to the total rent paid or to be paid during the first term, and divide the result into 21 equal parts.

We have nothing to do, under the case submitted, with costs of the motion or of the motion in *In re Geddes and Garde*, 32 O.R. 262.

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BRITTON, J.:—There must be an increase in the total amount of rent for the new term over that of the former term.

The total for the former term of 21 years was \$3,309.88, made up as follows:—

1 year	×	\$106.88	.....	\$ 106.88
4 years	×	130	.....	520.00
5 “	×	145	.....	725.00
11 “	×	178	.....	1,958.00
				<hr/>
				\$3,309.88

If the arbitrators allow an increase for  
the next term of..... 8.12

Making total rent..... \$3,318.00

and fix the annual rent at \$158, it will comply with the provision for renewal, and meet what is evidently a condition of things not anticipated by either of the parties at the time the lease was made.

21 years × \$158 = \$3,318.

T. T. R.

## [DIVISIONAL COURT.]

D. C.

1902

Jan. 8.

## MCGUINNESS V. MCGUINNESS ET AL.

*Execution—Sale of Land — Advertisement — Distribution—Costs of Execution  
Creditor—Creditors' Relief Act.*

Where two writs of execution against lands were placed in the sheriff's hands on the same day, and, no further steps being taken by the first execution creditor, the second execution creditor directed the sheriff to advertise and sell the lands, which he did under the second execution creditor's writ:—

*Held*, that the advertisement was in law the seizure of the lands under the second execution creditor's writ; and, there being no seizure or sale under that of the first, the second was entitled, under sec. 26 of the Creditors' Relief Act, R.S.O. 1897 ch. 78, to payment in full of his taxed costs and the costs of his execution, which exceeded the amount of the residue of the proceeds of the sale after payment of the sheriff's fees.

AN appeal by E. G. Porter, first execution creditor of the plaintiff, from an order of the Judge of the County Court of the county of Hastings varying the scheme of distribution by the sheriff of that county of a sum of money in his hands under the Creditors' Relief Act. The facts are stated in the judgment.

The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., and LOUNT, J., on the 15th November, 1901.

*W. H. Wallbridge*, for the appellant.

*H. L. Drayton*, for the respondents, the defendants in this action and second execution creditors.

January 8. MEREDITH, C.J.:—This is an appeal by an execution creditor (Porter) against an order made by the senior Judge of the county court of the county of Hastings, on the 4th June, 1901, varying the scheme of distribution by the sheriff of the county of Hastings of a sum of money in his hands for distribution under the provisions of the Creditors' Relief Act (R.S.O. 1897 ch. 78) so that, instead of the fund being distributed as proposed by the sheriff after payment of his costs and charges and the costs of the respondents' execution ratably between the execution creditors, the residue of the fund after deducting the sheriff's fees and charges was directed to be paid to the respondents as being entitled under the provisions



of sec. 26\* to payment in full of their taxed costs and the costs of their execution, which exceed the amount of the residue of the fund.

The fund was realized by the sheriff from the sale of the lands of the execution debtor.

The circumstances out of which the controversy has arisen are as follows:—

The appellant on the 21st February, 1900, placed in the hands of the sheriff for execution a writ of execution against the goods and lands of the execution debtor issued on a judgment recovered by the appellant against him, and the writ was indorsed with the usual direction to the sheriff to levy in accordance with its provisions.

Later on the same day the respondents placed their writ of execution against the goods and lands of the execution debtor in the hands of the sheriff for execution. It was issued upon a judgment for costs which they had recovered in an action brought by the execution debtor against them.

No further steps were taken by the appellant, but the respondents' solicitor, at what time is not stated, directed the sheriff to advertise for sale under their writ certain lands of the execution debtor.

The lands were, in pursuance of this direction, duly advertised to be sold under the respondents' writ only, on the 16th March, 1901.

On the day fixed for the sale the sheriff offered the lands for sale pursuant to his advertisement, under the respondents' writ, but no sale was effected for want of buyers.

The sheriff having made his return of lands on hand for want of buyers, a writ of *venditioni exponas* was issued on the respondents' judgment and delivered to the sheriff, under which, on the 19th March, 1901, he sold the lands; and the fund in question is the residue of the proceeds of this sale.

The contention of the respondents, which was upheld by the learned Judge of the county court, is, that they are the creditors at whose instance and under whose execution the seizure and levy were made, within the meaning of sec. 26,\* and therefore entitled to be paid in full their taxed costs and the costs of

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their execution, in priority to the other execution debts and claims.

However hard it may appear to be to the appellant that not he but the respondents should be paid their taxed costs in priority, when for all that appears he was ready and willing to have had the lands advertised and sold under his execution, and the advertisement and sale under the respondents' execution took place without giving him an opportunity to join in the advertising of the lands for sale, I see no escape from the conclusion to which the learned Judge has come.

It was under the respondents' writ that the lands were sold, and it was at their instance that they were advertised for sale.

The advertisement was in law the seizure of the lands under their writ, and there was no seizure or advertisement and no sale under the appellant's writ. The respondents' case, therefore, is brought within the very words of sec. 26,\* and they are, in my opinion, in accordance with its provisions, entitled to the priority which was given to them by the order of the learned Judge.

The appeal fails, and must be dismissed with costs.

LOUNT, J.:—I agree.

E. B. B.

\* 26. Where the amount levied by the sheriff is not sufficient to pay the execution debts and other claims, with costs, in full, the money shall be applied to the payment ratably of such debts and costs of the creditors, after retaining the sheriff's fees, and after payment in full of the taxed costs and the costs of the execution to the creditor at whose instance and under whose execution the seizure and levy were made.

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[MEREDITH, J.]

## RE SOUTHWOLD SCHOOL SECTIONS.

1902

Jan. 10.

*Public Schools—Union of School Sections—Powers of Arbitrators—Appeal to County Council—1 Edw. VII. ch. 39, sec. 42 (O.)—Costs.*

An application was made to a township council to alter the boundaries of three school sections, and was refused; an appeal was taken to the county council against such refusal; and arbitrators were appointed by the latter council under the authority of sec. 42 (3) of the Public Schools Act, 1 Edw. VII. ch. 39 (O.) The arbitrators made no alteration in the boundaries of any of the sections, but by their award assumed to unite two of the sections, and recommended the building of a new school house in a central position in the thus united sections:—

*Held*, that it was not within the power of the arbitrators to unite the two school sections upon an appeal against a refusal to comply with an application to alter boundaries only. The arbitrators are given power “to form, divide, unite or alter the boundaries;” but that means to form, divide, unite, or alter in accordance with the subject-matter of the appeal. Award set aside without costs.

SUMMARY application by John Culver and the board of public school trustees for school section number 13 of the township of Southwold for an order setting aside an award, dated the 19th November, 1901, made by arbitrators appointed by the county council of the county of Elgin to hear an appeal to the county council against the refusal of the township council of the township of Southwold to alter the boundaries of school sections 12, 13, and 14, for the purpose of enlarging school section 12, by which award the arbitrators purported to consolidate into one school section the sections numbered 12 and 13; and for an order for payment of the costs of the applicants of the application to some one or more of the respondents, who were: the county council, the township council, and the school boards of the other sections. The facts are stated in the judgment.

The application was heard by MEREDITH, J., in the Weekly Court, on the 8th January, 1902.

*A. B. Aylesworth*, K.C., for the applicants.

*J. M. Glenn*, K.C., for the township council of Southwold and the county council of Elgin.

*T. W. Crothers*, as *amicus curiæ*, was heard as on behalf of individual ratepayers of the township.

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SCHOOL  
SECTIONS.

January 10. MEREDITH, J.:—A township council may pass by-laws uniting two or more school sections within the township, provided that at public meetings called by the trustees, or inspector, for that purpose, a majority of the ratepayers present request such union: 1 Edw. VII. ch. 39, sec. 41, sub-sec. 1 (O.); and may also, without such request, pass by-laws to alter the boundaries of a school section, or to divide an existing section into two or more sections, or to unite portions of an existing section with another section, or with any new section, in case it clearly appears that all persons to be affected have been duly notified of the proposed proceedings, or of any application to the council for the purpose: sub-sec. 2.

And, by implication, authority is given to the trustees, or any five ratepayers concerned, to make application to the township council "to form, unite, divide or alter the boundaries of a school section, or school sections, within the township:" and authority is expressly given to "a majority of the trustees, or any five ratepayers of any one or more of the school sections concerned," to appeal to the county council against any by-law of the township council for the formation, division, union or alteration of their school section or school sections: sec. 42 (1).

Upon such an appeal the county council may appoint "arbitrators, not more than five nor less than three, two of whom shall be the county judge, or some person named by him, and the county inspector;" who shall form a "quorum" to hear such appeal, and to form, divide, unite or alter the boundaries of the school section or school sections, so far as to settle the matters complained of: sec. 42, sub-sec. (3).

An application was made to the township council to alter the boundaries of school sections 12, 13, and 14, "by taking about twelve hundred acres" from 13 and adding them to 12: and "by taking about two thousand acres" from 14 and adding them to 13.

The township council refused the application, declining to disturb existing boundaries: an appeal was taken, to the county council, against such refusal; and arbitrators were appointed by the latter council under the authority just mentioned.

The arbitrators made no alteration in the boundaries of any of the sections, but assumed to unite sections 12 and 13; and

recommended the building of a new school house in a central position in the thus united sections.

This motion is against that action of the arbitrators, and is made mainly on the ground, that it was not within their power to unite the two school sections upon an appeal against a refusal to comply with an application to alter boundaries only.

And, in my judgment, effect must be given to the applicants' contention.

It would be strange indeed if such power was conferred upon the appellate body: power to do that which none concerned applied for, and to which, it might be, everyone concerned was opposed.

The ratepayers are those most concerned; and to them, through their school board, elected by them, matters concerning the school section, and education within its limits, are mostly committed.

All changes such as those in question have their initiation in the township council: to that body all applications for any change must be first made: all changes made without application must be thus first made.

And that body has no power to unite two school sections without the consent, such as before mentioned, of the ratepayers of each.

The county council can act only upon an appeal against the action, or the want of action on an application to act, of the township council, and the appellate "quorum" are to hear "such appeal" and to act only "so far as to settle the matters complained of:" which matter, in this case, was the refusal of the township council to make the alterations applied for, as before mentioned.

It is true that the arbitrators are given power "to form, divide, unite or alter the boundaries;" but that must surely mean to form, divide, unite or alter, in accordance with the subject-matter of the appeal—to alter in such a case as this, to unite when union is the subject-matter and performance of conditions warrant it, and so on. It cannot have been meant that upon any and all sorts of appeals the whole structure of the school section is to be at the will of the arbitrators, regardless of the wishes of the ratepayers, and of their safeguards

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against action without their consent, such as have been before referred to.

The action of the arbitrators was, in my opinion, *ultra vires*, and is of no effect.

The motion is allowed ; but there will be no order as to costs. No order can be made rightly against the appellants, for they are in the right, and succeed in their contention: nor against either of the municipal councils, for they are blameless of the error, and have not sought to support it: nor against the board of either of the other two school sections, for neither are they blamable, so far as the evidence shews, for the error, nor have they endeavoured to support it: nor against any board of the assumed united sections, for they have, in my judgment, no legal existence, and no property out of which costs might be levied: nor against any individual, for the motion has not been made on notice to any.

E. B. B.



[LOUNT, J.]

## TOWNSHIP OF GLOUCESTER V. CANADA ATLANTIC R.W. CO.

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Jan. 7.

*Way—Road Allowance—Obstruction—Railways—Fences—Municipal Corporation—By-law—Railway Act of Canada—Railway Committee of Privy Council—Injunction—Removal of Obstruction—Jurisdiction.*

An action for an injunction to restrain the defendants from obstructing a highway in the township, by fences on both sides of the defendants' tracks where they crossed the highway, and for a mandatory order compelling the removal of the fences:—

*Held*, that the allowance for the road in question, having been made by a Crown surveyor, was a highway within the meaning of sec. 599 of the Municipal Act, and, although not an open, public road, used and travelled upon by the public, it was a highway within the meaning of the Railway Act of Canada, 51 Vict. ch. 29.

2. That, although the road allowance had not been cleared and opened up for public travel and had not been used as a public road, it was not necessary for the municipality to pass a by-law opening it before exercising jurisdiction over it; the council might direct their officers to open the road, and such direction would be sufficient.
  3. That the right of the railway company under sec. 90 (g) of the Railway Act to construct their tracks and build their fences across the highway was subject to sec. 183, which provides against any obstruction to the highway, and sec. 194, which provides for fences and cattle-guards being erected and maintained; and, therefore, the defendants had no right to maintain fences which obstructed the highway or interfered with the public user or with the control over it claimed by the municipality.
  4. That the Railway Committee of the Privy Council had no jurisdiction to determine the questions in dispute; sec. 11 (h) and (q) of the Railway Act not applying.
  5. That the Court had jurisdiction to grant the relief sought.
- Fenelon Falls v. Victoria Railway Co.* (1881), 29 Gr. 4, and *City of Toronto v. Lorsch* (1893), 24 O.R. 227, followed.
6. That the highway being vested in the township corporation, who desired to open and make it fit for public travel, the plaintiffs were entitled to have the defendants enjoined from obstructing it and ordered to remove the fences.

SPECIAL case stated by the parties, and heard by LOUNT, J., at the Ottawa Weekly Court, on the 14th September, 1901. The facts are stated in the judgment.

*G. F. Henderson*, for the plaintiffs.

*F. H. Chrysler*, K. C., and *C. J. R. Bethune*, for the defendants.

January 7. LOUNT, J.:—This action is brought for an injunction to restrain the defendants from obstructing the highway between the 5th and 6th concessions of the township of Gloucester, with fences, on either side of the tracks of the

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defendants where they cross the highway, and for a mandatory order compelling the removal of the fences.

Pursuant to the provisions of Con. Rule 372, by agreement between the parties, the following special case is stated for the opinion of the Court:

1. The plaintiff is a municipality within the meaning of the Municipal Act, R.S.O. 1897 ch. 223.

2. The defendant is a railway company duly incorporated by Acts of the Parliament of Canada, owning and operating a railway in the Province of Ontario and elsewhere, and within the exclusive jurisdiction of the Parliament of Canada.

3. The defendant is, by its various Acts of incorporation, authorized and empowered to construct as part of its system of railways a line of railway, with one or more sets of rails or tracks of a gauge of four feet eight and one-half inches, from some point on the river St. Lawrence at or near Coteau Landing, in the county of Soulanges, in the Province of Quebec, to the city of Ottawa, in the Province of Ontario.

4. Pursuant to the authority conferred upon the said defendant company by the said Acts of the Parliament of Canada, the said defendant duly constructed a line of railway which may be in part described as extending from the St. Lawrence river at or near Coteau, in the Province of Quebec, to the said city of Ottawa.

5. The said line of railway mentioned in paragraph 4 hereof was completed in or about the month of March, 1882, and since the said last mentioned date the defendant has maintained and operated the said line of railway.

6. The said township of Gloucester was duly surveyed by the Crown surveyors for the late Province of Upper Canada, now the Province of Ontario, and subdivided into lots for settlement prior to the date of the construction of the defendant's line of railway, and in and by the said Crown survey of the said township an allowance was reserved for a road between lots 15 and 16 in the 5th concession of the said township. After the said Crown survey and prior to the construction of the said railway the said township was duly organized as a municipal corporation.

7. The defendant's line of railway intersects the said allowance for road between lots 15 and 16 in the 5th concession of the township of Gloucester at the point shewn upon the plan hereunto attached.

8. That portion of the said allowance for road between said lots 15 and 16 in the 5th concession of the said township where the said road is crossed by the defendant's line of railway, and for a distance of about a mile on each side of the said line of railway, was not, at the time the defendant's line of railway was constructed, and has not up to the present date been, used for travel by the public, nor is the same in its present condition a highway in fact, or suitable for use by the public as a highway, but other portions of the said road have been generally travelled for several years, and the plaintiff municipality is now desirous of completing the said road and opening it at the point where it is crossed as aforesaid.

9. No by-law has ever been passed by the plaintiff municipality requiring the opening of the said allowance for road, nor has any work been done by the said plaintiff municipality to grade the said allowance for road or to put the same in condition for public travel at the point where the same is intersected by the defendant's line of railway, or for a distance of about one mile on each side of the said point of intersection as aforesaid, the said road at that point being grown over with bushes and underbrush, but the plaintiff municipality intends to prosecute the work necessary to open the said road as soon as the rights of the parties hereto are determined.

10. The said allowance for road is unfenced on either side of the railway for a distance of about one mile on each side of the said point where the same is intersected by the defendant's line of railway, and the plaintiff municipality contends that it has not power to compel the owners of lands which abut upon the said allowance for road to fence the said lands.

11. At the time the defendant's line of railway was constructed in the said township of Gloucester the defendant caused to be erected on each side of the railway through the said township fences of the height and strength of an ordinary division fence, which said fences have ever since the construction of the said railway been maintained by the defendant, and

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the said fences are erected on each side of the railway across the said allowance for road at the point where the same is intersected by the defendant's said line of railway. The plaintiff municipality has not expressly consented to or acquiesced in the construction or maintenance of the said fences across the said allowance for road by resolution or any other corporate act.

The questions for the opinion of the Court are :

*First*, whether the Court has jurisdiction to grant the relief sought by the plaintiff in this action.

*Second*, whether, if the Court possesses jurisdiction, the plaintiff is entitled to an injunction restraining the defendant from continuing the maintenance of its said fences across the allowance for road between lots 15 and 16 in the 5th concession of the said township of Gloucester.

The motion before me is for an order or injunction restraining the defendants from obstructing the highway or road allowance mentioned in the special case, with fences, as therein mentioned, and for a mandatory injunction compelling their removal.

Counsel for the defendants argue against the motion that the highway being a highway in law, and not a highway in fact, that is, an open public road used and travelled upon by the public, it is not a highway within the meaning of the Railway Act of Canada, 51 Vict. ch. 29. To this conclusion I have not been able to come.

Section 598 of the Municipal Act, R.S.O. 1897 ch. 223, provides that "all allowances made for roads by the Crown surveyors in any town, township, . . . shall be deemed common and public highways." The allowance for the road in question was made by a Crown surveyor, and it is, therefore, a highway within the meaning of this section.

By the interpretation section of the Municipal Act, sec. 2, sub-sec. 6, "a highway shall mean a public highway," and Elliott on Roads and Streets, ch. 1, in defining a highway says (secs. 1, 2): "The term highway is the generic name for all kinds of public ways, including county and township roads . . . Although every public thoroughfare is a highway it is not essential that every highway should be a thoroughfare,



as it is now well settled that a *cul de sac* may be a highway:" and "In order that a way may be considered a public one it is not necessary that it should be of such dimensions as to make it suitable for use by horsemen and vehicles, unless the statute so provides. When the statute declares what shall constitute a highway, it governs. . . . In the absence of a statute, a way may be public, although it is suitable for passage only by footmen:" sec. 4.

In *Regina v. Hunt* (1865), 16 C.P. 145, at p. 158, A. Wilson, J., said: "Beyond all question a public road laid out by a duly authorized Crown surveyor upon Crown land is a public road, though not laid out upon the ground." And in appeal (1867), 17 C.P. 443, at p. 447, Draper, C.J., said: "I agree entirely with the conclusion arrived at in the Court below, and upon this ground, that the existence of these streets as public highways is shewn by the work on the ground at the original survey, and by the adoption, on the part of the Crown, of that work as exhibited on the plan thereof returned, which adoption is established by the disposition of lands in accordance with such plan and survey. Thereby, in my opinion, these streets became public highways."

By the interpretation clause of the Railway Act, sec. 2 (g), "The expression 'highway' includes any public road, street, lane or other public way or communication." The defendants say that, by this interpretation and the construction to be placed upon it by the sections of the Act where the word "highway" is used, the proper meaning to be given is, "a public road opened up and in actual use by the public," and not an unopened road. I do not see why this restricted meaning should be adopted, more especially as the word "highway" *includes* any public road, street, lane, or other public way or communication. I think it must be conceded that Parliament intended to give and did give to the word "highway" a full and not a limited meaning.

In my opinion, the allowance for road is a public highway, a public road, within the meaning of the Railway Act and of the Municipal Act, although not opened up.

The defendants also argue that, as the road allowance where the fences cross and for a mile on either side along the road

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allowance has not been cleared and opened up for public travel, and has not been used as a public road, it is necessary that the municipality should first pass a by-law opening it up before the municipality can exercise any jurisdiction or control over it.

I do not find any authority for this contention, and none was cited on the argument. The Municipal Act, sec. 600, says: "Subject" (to certain exceptions which do not apply here) "the municipal council of every municipality shall have jurisdiction over the original allowances for roads and highways within the municipality." Section 632 says: "No municipal council shall pass a by-law for stopping up, altering, widening, diverting, leasing or selling any *original allowance for road*, or for *establishing, opening, &c.*, any other public highway, road," etc. It will be observed that this section makes no reference to the opening of original road allowances, but to the opening of public highways other than road allowances. Section 637 says: "The council of every county, township, &c., may pass by-laws," by sub-sec. 1:—"For opening, &c., roads, &c., within the jurisdiction of the council." As I read this section, it does not apply to *original road allowances*. A by-law, therefore, is not necessary. The council may direct its officers, such as the overseer or pathmaster, to open the road, and such direction would be sufficient.

The defendants further argue that under sec. 90, sub-sec. (g), of the Railway Act, they had the right to construct their tracks and build their fences across the highway. This right is, I think, subject to sec. 183, which provides against any obstructions to the highway, and to sec. 194, which provides for fences and cattle-guards being erected and maintained, etc. Therefore the defendants have no right to maintain fences which obstruct the highway or interfere with the public user or with the control over it now claimed by the municipality.

Another contention of the defendants is that the Railway Act, by sec. 11, has created a tribunal and the only tribunal having jurisdiction to deal with the questions in dispute. By sec. 11, "The Railway Committee shall have power to enquire into, hear and determine any application, complaint or dispute respecting:" sub-sec. (h): "The construction of railways upon, along and across highways."

The question in dispute is not as to the construction of the railway along and across the highway. The railway tracks and fences were constructed and built in March, 1882, but the question now is as to whether or not the defendants can maintain the fences across the highway as against the rights of the municipality to have them removed. In my opinion, the sub-section does not apply. By sub-sec. (g): "Any highway or street . . . over or through lands owned or occupied by the company." This sub-section is intended to apply to the opening of roads, etc., across lands owned or occupied by the railway, and not to public highways vested in the municipality, upon which the defendants have only a right to cross subject to the provisions of the Act. The Railway Committee, in my opinion, have no jurisdiction to hear and determine the questions in dispute.

Has this Court jurisdiction? Authority is to be found in *Fenelon Falls v. Victoria Railway Co.* (1881), 29 Gr. 4. Boyd, C., said (p. 10): "I incline to think that by virtue of the provisions of the Municipal Act there is such power of management and control as to highways and streets bestowed upon the local municipalities, and such an interest in the public easement vested in them, and such a responsibility cast upon them in the event of the highways being out of repair, as to justify their intervention as plaintiffs in cases like the present, for the preservation of the rights of the inhabitants, and to restrain other bodies like the defendants from transgressing the statutory regulations imposed upon them in the construction of their works." The learned Chancellor cites a number of cases. In *City of Toronto v. Lorsch* (1893), 24 O.R. 227, Rose, J., held that a municipal corporation has the right to have it declared, as against a private person, whether or not certain land is a public highway, and whether such person has the right to possess, occupy, and obstruct the same. I adopt the opinions above expressed, and apply them in affirmation of the jurisdiction of this Court.

Is the plaintiff then entitled to an injunction restraining the defendants from continuing the maintenance of their fences, and should such relief be given?

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By the Municipal Act, sec. 601, "Every public road, street bridge or other highway, in a city, township, town or village . . . shall be vested in the municipality." The highway being so vested and the municipality desiring to open and make it fit for public travel, I think the contention of the defendants cannot be upheld, and the plaintiff is entitled to the relief sought.

I therefore answer both the questions submitted to the Court in the affirmative, and the Court doth declare accordingly. An order will go restraining the defendants from obstructing the highway or road allowance mentioned, with the fences mentioned, and compelling the removal of the said fences. Costs to the plaintiff.

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## [DIVISIONAL COURT.]

EXCELSIOR LIFE INS. CO. v. EMPLOYERS' LIABILITY  
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RE FAULKNER.

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Jan. 30.

*Arbitration and Award—Submission—Appointment of Sole Arbitrator—  
Arbitration Act, R.S.O. 1897, ch. 62, sec. 8.*

A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient:"—

*Held*, MACMAHON, J., dissenting, that the submission was one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of the Arbitration Act, R.S.O. 1897, ch. 62, sec. 8; and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other might appoint a sole arbitrator.

Decision of Street, J., 2 O.L.R. 301, affirmed.

*Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls* (1901), 2 O.L.R. 585, overruled.

AN appeal by the Employers' Liability Assurance Corporation from the decision of Street, J., 2 O.L.R. 301, dismissing their application for an order setting aside the appointment of Edward Morgan as sole arbitrator, and prohibiting him from proceeding as sole arbitrator, under the circumstances mentioned in the former report.

The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and LOUNT, JJ., on the 15th November, 1901.

A. B. Aylesworth, K.C., for the appellants. This is not a submission to two arbitrators, but to three: *Gumm v. Hallett* (1872), L.R. 14 Eq. 555; *In re Smith & Service and Nelson & Sons* (1890), 25 Q.B.D. 545; *Re Sturgeon Falls Electric Light and Power Co.*, recently decided by the Chancellor.\* The arbitrator has gone on and made an award. The Judge

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under the proviso to sec. 8† of the Act has no discretion to refuse the motion and leave the parties to an action—it is a question of legal right.

*R. McKay*, for the Excelsior Life Insurance Company. No appeal lies to this Court from the decision of the Judge in Chambers. The words “Court or a Judge” do not confer any right of appeal. By R.S.O. 1897 ch. 76, sec. 6, there shall be no appeal from the order of a Judge as *persona designata* unless the statute giving the jurisdiction specially authorizes it. It was held in *Re Bireley and Toronto, Hamilton, and Buffalo R.W. Co.* (1898), 25 A.R. 88 (and see cases cited at p. 89), that there was no appeal under a statute similarly worded. Statutes in *pari materia* should be construed in the same way: *Hardcastle*, 3rd ed., pp. 147-151; *Rex v. Surrey* (1788), 2 T.R. 504. On the merits, the decision of the Judge below is correct. We had a right to an arbitration by two arbitrators; if they agreed, there was an end of the matter. *Manchester Ship Canal Co. v. Pearson*, [1900] 2 Q.B. 606, is the most recent case; it refers to *In re Smith & Service and Nelson & Sons*, cited by my learned friend.

*Aylesworth*, in reply. As to the right of appeal, sec. 169 of the Common Law Procedure Act contained the same language practically, and there was always an appeal under that. The Judge is not *persona designata*, but the delegate of the Court. There is no discretion; the language is imperative: *Tyson v. McLean* (1854), 1 P.R. 339.

January 30. MEREDITH, C.J.:—This is an appeal by the Employers' Liability Assurance Corporation from an order of Street, J., refusing to set aside the appointment by the respon-

† R.S.O. 1897 ch. 62, sec. 8:—Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention:— . . .

(b) If, on such a reference, one party fails to appoint an arbitrator . . . for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent;

Provided that the Court or a Judge may set aside any appointment made in pursuance of this section.



dent company of Edward Morgan, Esquire, as sole arbitrator, under a submission contained in a policy issued by the appellants to that company.

The case is reported in 2 O.L.R. 301, and the facts are sufficiently set forth there.

The question for decision is, whether the submission is one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of sec. 8 of the Arbitration Act, R.S.O. 1897 ch. 62.

The submission provides "that, if any difference shall arise in the adjustment of a loss, the amount to be paid by the corporation shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient."

It has been held that a reference to three arbitrators, providing that the award of a majority of them shall be sufficient, does not come within the section: *Gumm v. Hallett*, L.R. 14 Eq. 555, where the question arose on sec. 13 of the Common Law Procedure Act, 1854, the provisions of which are substantially the same as those contained in sec. 8 of the Arbitration Act: *In re Smith & Service and Nelson & Sons*, 25 Q.B.D. 545, though in the latter case Lord Justice Lindley (p. 552) said that it certainly looked like a blot in the Act, that by reason of there being no provision as to three arbitrators, as distinguished from two arbitrators and an umpire, secs. 4, 5, and 6 of the English Act, sec. 6 of which corresponds with sec. 8 of our Act, did not apply; *Manchester Ship Canal Co. v. Pearson*, [1900] 2 Q.B. 606, where Lord Justice A. L. Smith expressed his concurrence with the view of Lord Justice Lindley, but declined to make another blot in the Act by holding that the power to stay an action conferred by sec. 4 was not applicable to a submission providing for a reference to three arbitrators, one to be appointed by each of the parties and the third by the two so appointed.

Counsel for the appellants in his argument before us relied upon these decisions as conclusive against the right of the respondent company to appoint a sole arbitrator under the provisions of sec. 8, and subsequently referred us to the case of

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*Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls* (1901), 2 O.L.R. 585, recently decided by the Chancellor of Ontario, in which he held, refusing to apply the decision of my brother Street in this case, that a submission providing for a reference to three arbitrators, appointed one by each of the parties to it and the third by the two arbitrators in case of dispute, and that the award of a majority of them was to be binding, was not within sec. 8.

We should have preferred not to decide the important question which has been raised on a summary application under the proviso to sec. 8, but to have left the appellants to raise it in any action or proceeding which may be brought or taken by the respondent company to enforce the award which has now been made, but, as the appellants insist that they are entitled to have the question determined on their application, we have come to the conclusion to decide it without at all conceding that the matter is one as to which the Court or a Judge may not exercise a discretion as to granting or refusing the application.

It is to be observed that in the English cases referred to the reference was in terms to three arbitrators, one to be appointed by each of the parties and the third by the two so chosen, though the award of a majority was to be sufficient, and that under such a submission it is probably *necessary* that the third arbitrator be appointed before the reference is proceeded with (*Peterson v. Ayre* (1854), 14 C.B. 665), while in this case the reference is in terms to two arbitrators, and the intervention of a third arbitrator is, according to the terms of the submission, to take place if the two are unable to agree, and then the reference is to be to the three, and the award of the majority is to be sufficient.

Why then should not the submission be held to come within sec. 8? If, as must be and was conceded in *In re Smith & Service and Nelson & Sons*, a reference to two arbitrators, one to be appointed by each party, is within sec. 8, although the submission further provides that the two arbitrators may appoint an umpire and that in certain events the umpire may make the award in lieu of the arbitrators, [and such a provision is since the Act came into force to be deemed to be included in a submission unless a contrary intention is expressed in it], I

am unable to understand why a submission to two arbitrators, one to be appointed by each party, with a provision that if the two arbitrators are unable to agree they are to choose a third arbitrator and the award of the majority is to be sufficient, is not also within sec. 8.

To hold that it is not, I venture to think, would be to make another blot in the Act, and neither the spirit nor the letter of sec. 8, in my opinion, requires us to do that.

In the case relied on by the learned Chancellor as establishing that the arbitrators appointed by the parties need not delay appointing the third arbitrator until a dispute has arisen between them, but may properly appoint the third arbitrator before proceeding with the reference (*Bates v. Cooke* (1829), 9 B. & C. 407), the question arose not as to the appointment of a third arbitrator but of an umpire, and there are numerous other cases to the same effect: *Winteringham v. Robertson* (1858), 27 L.J. Ex. 301; *Roe d. Wood v. Doe* (1788), 2 T.R. 644; *Harding v. Watts* (1812), 15 East 556; but I have been unable to find a case in which such a question has arisen as to the appointment of a third arbitrator.

It is stated in Russell on Awards, 8th ed., p. 156, that "if two arbitrators only are appointed by the submission, and they are to choose a third to act with them, and an award made by any two is to be valid, they must choose their colleague before they take any step in the reference, in order that the parties may have the benefit of the judgment of all three on the whole of the matters."

This statement manifestly refers to a case of a reference which is to three arbitrators, one appointed by each of the parties to the submission and the third to be chosen by the two, and can, I think, have no application where the reference is to two arbitrators and not to three, unless in the event of the two failing to agree. Granting that, though the submission in question provides that the third arbitrator is to be appointed if the two arbitrators are unable to agree, it would not have been improper for the two arbitrators to choose the third before proceeding with the reference, it does not necessarily follow that the reference is therefore to three arbitrators, but rather that provision is thereby made for constituting the tribunal of

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three arbitrators who are to act in the event of the two being unable to agree. This view of the matter is, I think, indicated by Mr. Justice Bayley in delivering the judgment of the Court in *Bates v. Cooke*, in the observation which he makes at p. 408, "that" (*i.e.*, the appointment of an umpire before proceeding with the reference), "however, is a fair mode of making the appointment, *in case it should be necessary to have his interference.*"

The learned Chancellor seems to have been much affected by the fact that the making of an award by a sole arbitrator would be in direct contravention of the provision of the submission he was dealing with, that the award should be made by three arbitrators or a majority of them; but it appears to me that this fact has not the importance given to it, for the same anomaly, if it be an anomaly, would result where the submission provides for a reference to two arbitrators, and it is to be remembered that the sole arbitrator is not the tribunal constituted by the parties for determining the matters in dispute, but one created by the authority of the statute where one of the parties has made it impossible that the agreed tribunal shall be constituted, by refusing or neglecting in breach of his agreement to appoint an arbitrator.

Upon the whole, I am of opinion that the judgment of my learned brother Street is right and should be affirmed, and the appeal from it dismissed with costs.

LOUNT, J.:—I agree.

MACMAHON, J.:—I have read the judgment of the learned Chancellor in the case of *Re Sturgeon Falls Electric Light Company and Town of Sturgeon Falls*; and, if I may be permitted to say so, entirely concur therein, and think it governs the present case. As appears by the judgment, the submission in that case provided that any disputes arising under the agreement as to the working of the power, etc., "should be referred to arbitration in the usual way, by each party choosing an arbitrator, and they two a third in case of dispute; and the award of the majority to be binding." The third arbitrator was only to be appointed "in case of dispute" between the two arbitrators appointed by the parties; while in



the case in hand the third arbitrator is only to be appointed if the two arbitrators appointed by the parties were "unable to agree." I cannot see, therefore, how a distinction can be drawn between the submissions in the two cases.

In Redman's Law of Awards, 3rd ed., p. 2, the author, in discussing the effect of sec. 6 of the English Act (sec. 8 of our Act), says:—

"The Act does not contemplate a reference to three arbitrators, and in the case of a mere agreement to refer which does not appoint the arbitrators and provides for a reference to three arbitrators, one to be appointed by each party and the third by the two so appointed, as distinguished from two arbitrators and an umpire, the Act does not enable the Court to compel one of the parties to appoint an arbitrator. (*Re Smith and Nelson's Arbitration*, 25 Q.B.D. 545, 59 L.J.Q.B. 533.)"

Where a submission makes provision for the appointment of a third arbitrator, although he is not to be chosen unless the two appointed by the parties are unable to agree, it thereby provides for a contingency which may happen, namely, a reference to three arbitrators. I, therefore, with great respect, think that the submission in this case is not within the Act, and that the appeal should be allowed.

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McCOWAN ET AL. V. ARMSTRONG.

Jan. 9.

*Limitation of Actions—Real Property Limitation Act—Parent and Child—Tenancy at Will—Accrual of Right of Entry—Commencement of Statute—Caretaker—Effect of Entry by Consent—Creation of New Tenancy—Assessment—Agreement—Concealment of Facts—Family Arrangement—Will—Devise Subject to Charge—Election—Mistake.*

In the autumn of 1879 the defendant was put by his father in possession of a farm. His father told him that he had bought the farm for him, but the defendant knew that what was done had not the effect of transferring the title to him, and was aware that it must be obtained either by conveyance or devise from his father. The father did not intend to divest himself of the ownership of the farm, but to leave himself free, in devising it, as he intended, to his son, to charge it with the payment of such sum as he might think it right to require him to pay. The defendant continued in possession of the farm until his father's death, in 1900, occupying it for his own benefit, and having the exclusive enjoyment of the profits; he paid no rent and rendered no service or other return for it, and gave no acknowledgment of his father's title; he also made valuable permanent improvements at his own expense:—*Held*, that the title of the father had, long before his death, by force of the Real Property Limitation Act, R.S.O. 1897, ch. 133, become extinguished. The defendant became, upon his entry with the permission of his father, a tenant at will, and that tenancy never having in fact been determined, the father's right of entry first accrued at the expiration of one year from the commencement of it (sec. 5, sub-sec. 7), and was barred at the expiration of eleven years.

There was no evidence that the defendant was a caretaker or servant of his father.

Upon the expiration of the tenancy at will the possession of the defendant became that of a tenant at sufferance, and the running of the statute was not stopped by an entry, unless, before the statute had operated to extinguish the title of the testator, a new tenancy at will was created; and this would have been the case even if the tenancy at will had been put an end to in fact, and not merely by force of sec. 5, sub-sec. 7; the effect of the sub-section is, that it is for the purposes of the statute only that the tenancy at will is to be deemed to be determined at the expiration of a year from the time when it began.

*Held*, however, that there was no entry by the father sufficient to prevent the running of the statute; a visit made by the father to the son, within eleven years before action, when he lived with him on the farm for a few days, was not an entry on the land and did not put an end to the existing tenancy at will.

In 1879 and 1880 the farm was assessed in the name of the father as well as of the defendant, to the former as "freeholder," and to the latter as "owner," and from 1880 to 1899 to both as freeholders, and in 1882 this was done at the instance of the defendant, who also knew of the way in which the assessment was made in each of these years:—

*Held*, that this was not evidence of a new tenancy at will created within eleven years before the commencement of the action.

*Doe d. Bennett v. Turner* (1840), 7 M. & W. 226, and (1842), 9 M. & W. 643, distinguished.

By an agreement in writing, made a few days after the death of the father, between the devisees and legatees under the father's will, the defendant admitted and acknowledged that, although the farm was occupied by him, the father was at the time of his death the owner in fee simple of it, and agreed to abide by the will and to carry out the terms of it. By the will the

father devised the farm to the defendant, charged with the payment of \$4000. This agreement was made before the will had been opened or the contents of it known to the defendant; no doubt existed as to the validity of the will; and the object of the agreement was, though this was not known by or communicated to the defendant, to get rid of any difficulty which might arise if the defendant asserted title to the farm under the Real Property Limitation Act, but the defendant did not in fact know of his rights under that statute:—

*Held*, that, in these circumstances, the agreement was not, even when viewed as a family arrangement, binding on the defendant.

*Fane v. Fane* (1875), L.R. 20 Eq. 698, applied and followed.

*Held*, also, that, if there was any election by the defendant to take under the will, it was made under a mistake as to his rights; and besides, if the agreement fell, what the defendant did which was relied on as being an election, being a part of the same transaction, must fall with it.

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THIS action was tried before MEREDITH, C.J.C.P., without a jury, on the 18th and 20th September, 1901, at Toronto. The facts appear in the judgment.

*E. D. Armour*, K.C. (*W. B. Milliken*, with him), for the plaintiffs.

*E. F. B. Johnston*, K.C. (*J. D. Montgomery*, with him), for the defendants.

January 9. MEREDITH, C.J.:—The plaintiffs are the executors of the last will and testament of Edward Armstrong, and the beneficiaries under his will other than the defendant.

It is alleged in the statement of claim that the testator, who died on the 12th January, 1900, was the owner in fee simple of the farm in question; that by his will he devised it to the defendant, who was his son, charged with the payment of \$4000, which he directed him to pay to his executors in twelve successive annual payments of \$333.33 each, the first of such payments to become payable at the expiration of a year from the death of the testator; that the defendant became aware of the devise to him on or about the 18th January, 1900, and accepted it, and that he is in possession of the farm under it; that the defendant pretends that he went into possession as owner of the farm, and that the testator was not the owner of it in fee simple at the time of his death, but that the fact is that the testator permitted and allowed the defendant and another of his sons to occupy the farm and another farm, and did not give or grant them to the defendant and the other son, but that the defendant and the other son always occupied these farms under the license and with the leave of the testator;

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that by an agreement bearing date the 18th January, 1900, made between the plaintiff James Harvey Armstrong and other devisees and legatees under the will, the defendant admitted and acknowledged that, although the farm was occupied by him, the testator was at the time of his death the owner in fee simple of it, and that by the same agreement the defendant agreed to abide by the will and to carry out the terms of it, and that the first instalment has fallen due and has not been paid; and the plaintiffs' claim is for payment by the defendant of the instalment and interest, and in default of payment that the farm may be sold for the satisfaction of the charge; the plaintiffs also claim to be paid their costs by the defendant, and further and other relief.

The defendant by his statement of defence puts in issue all the allegations of the statement of claim except the purely formal ones; alleges that he entered into possession of the farm as owner of it in the year 1878, and into the receipt of the rents and profits thereof, and improved and built thereon; that he has ever since been and is now in personal occupation and possession of the farm; that the testator was not at the time of his death the owner of it, and had not then any right, title, or interest therein or thereto; that, under the provisions of R.S.O. 1897 ch. 133, the right and title of the testator, and consequently of the plaintiffs, became extinguished, and that by reason of his occupation and possession he is, under the provisions of the same Act, the owner of the farm free from any lien, charge, or incumbrance attempted to be created thereon by the testator; that the agreement of the 18th January, 1900, set up by the plaintiffs, is not under seal, and was without consideration, and that if he signed it, which he denies, he did so without knowledge of his rights or of the facts or of the nature or possible effect of it, and that it was procured by misrepresentation and is not binding, and he asks that it may be so declared.

It will be necessary, or at all events convenient, to consider what the position and rights of the defendant in respect of the farm were at the time of the death of the testator, before dealing with the effect of the agreement which the plaintiffs set up

and rely on, and of the acts and conduct of the defendant since the death of the testator.

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The testator, who appears to have been a man of considerable property and means, on the 5th March, 1878, obtained a conveyance of the farm in question from the then owner of it, Thomas Nattress, from whom he had purchased it for \$7,000.

The farm is in the township of Chinguacousy, in the county of Peel, and the testator was a resident of the township of York, in the county of York, in which township he continued to reside until the time of his death. He owned at the time of his death, and probably when he purchased the farm in question, two farms in the township of York, one of which was the homestead farm on which he lived.

He had seven sons and four daughters. One of the sons (Albert), to whom a legacy of \$3,000 was bequeathed, died after the testator; another (Joseph) went on a farm in the township of York which belonged to his father, and continued to reside there until his father died, and this farm was devised to him by the testator, charged with the payment of a legacy of \$4,000. James Harvey and George Nelson, two others of them, lived with their father until he died; to James Harvey he devised the homestead farm and all his household furniture and the horses, waggons, and farming implements on the farm, all charged with the payment of \$5,500; and to George Nelson he bequeathed a legacy of \$4,500; another son, Edward, worked on his own account, and to him a legacy of \$1,000 was bequeathed. John, another son, bought a farm near Woodstock for himself, and went to reside on it; to him a legacy of \$1,500 was bequeathed. The four daughters married, and one of them died in the lifetime of the testator; to each of the surviving daughters he bequeathed a legacy of \$1,000, and to each of the two children of his deceased daughter, \$500; he also bequeathed a legacy of \$500 to his grandson Joseph, son of his son Joseph; and to the defendant he devised the lands in question subject to the charge of \$4,000. All the residue of his estate he gave to such of his children as should be living at his death.

No provision appears to have been made by the testator for any of his children except that which he made by his will, and such as was made for the defendant and for Joseph in the



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enjoyment by them of the farms on which they respectively resided.

In the fall of 1879,—possession not having been obtained until then,—the defendant was put in possession of the farm in question. I accept as true his testimony as to the circumstances in which he went into possession, and I do not doubt that, as he deposed, his father told him that he had bought the farm for him, but it is also, I think, not open to doubt that the defendant knew that what was done had not the effect of transferring the title of the farm to him, and was aware that his title must be obtained either by conveyance or devise from his father, and that he probably expected that it would be by the latter mode. My conclusion also is, that the father did not intend, by anything that was done, to divest himself of the ownership of the farm, but to leave himself free, in devising it, as he intended, to his son, to charge it with the payment of such sum as he might think it right to require him to pay, so that he might be enabled to make such a division of his property among his children as he deemed fair and just to all of them, and I think that the defendant understood that it was in the power of his father to do this, though he probably hoped that the burden would be a light one,—much lighter than that which his father has sought by his will to impose—and he perhaps thought that no burden at all might be put upon him.

The defendant has continued in possession of the farm ever since he entered on it, occupying it for his own benefit, and having the exclusive enjoyment of the profits of it. His possession, occupation, and enjoyment of it differed in no respect, as far as was apparent to others, from those of an owner in possession; he paid no rent and rendered no service or other return for it, and gave no acknowledgement of his father's title.

While he has been in possession he has made valuable permanent improvements in clearing, draining, fencing, and otherwise improving the farm, as well as in the erection of buildings upon it; these improvements represent at least half the present value of the farm, though they cost more than that; and they have all been made at the expense of the defendant, except that in the first year or two of his possession the father



gave him some timber which was required for a building which the defendant was then erecting.

On this state of facts, I am of opinion that the right and title of the testator to the lands in question had, long before his death, by force of the Real Property Limitation Act (R.S.O. 1897 ch. 133), become extinguished.

The defendant became, upon his entry with the permission of his father, a tenant at will, and the father's right of entry is to be deemed to have first accrued either at the determination of that tenancy or at the expiration of one year next after the commencement of it (which ever first happened): sec. 5, sub-sec. 7; and, as it does not appear thus far that the tenancy was ever in fact determined, the father's right of entry was barred at the expiration of eleven years from the commencement of the tenancy, and his right and title to the lands was then extinguished.

It is impossible for me on the evidence to come to the conclusion that the defendant's possession was that of the father by reason of its being either as caretaker for him or as his servant.

There is not, I think, the slightest evidence that the defendant ever occupied the position of caretaker of the farm for his father, or that the relation of master and servant in regard to it ever existed between them. The nature of the enjoyment of the farm and of the acts done by the defendant is, in my view, wholly inconsistent with any such position having been occupied by him or of any such relation having existed, and is consistent only, unless the defendant is to be treated as wrongfully occupying, with such a possession as entitled him to the exclusive enjoyment for his own use of the land and the fruits of it, and therefore that of an owner or tenant in possession.

But it was argued on behalf of the plaintiffs that the evidence shewed that within eleven years before the commencement of the action the testator had made an entry upon the lands, and that that made a new starting point for the statute, and that his right and title had therefore not been extinguished.

Had the testator made an entry sufficient to put an end to the tenancy at will within eleven years before the commencement of the action, it would not have availed to stop the

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running of the statute against him unless it was also shewn that a new tenancy had been created before the statute had operated to extinguish his right and title: *Doe d. Dayman v. Moore* (1846), 9 Q.B. 555, *per* Patteson, J., at p. 558; *Doe d. Goody v. Carter* (1847), *ib.* 863; *Day v. Day* (1871), L.R. 3 P.C. 751; Woodfall's Landlord and Tenant, 16th ed., p. 244; Foa on Landlord and Tenant, 3rd ed., p. 620 *et seq.*; Sm. L.C., 10th ed., vol 2, p. 662 *et seq.*

According to these authorities, if the tenancy at will was determined upon the expiration of it, the possession of the defendant became that of a tenant at sufferance, and the running of the statute was not stopped, unless, before it had operated to extinguish the right and title of the testator, a new tenancy at will was created; and this would have been the case even if the tenancy at will had been put an end to in fact, and not merely by force of sub-sec. 7 of sec. 5.

Although at one time it appears to have been thought that the effect of sub-sec. 7 was to put an end to a tenancy at will for all purposes at the latest at the expiration of a year from the time when it began, that is not now, I think, the law; the more correct view is, and it is to be taken to be the law, that it is for the purposes of the statute only that the tenancy at will is to be deemed to be so then determined.

I do not, however, think that there is evidence of an entry having been made. As shewing that there had been an entry by the testator sufficient to prevent the Real Property Limitation Act operating to extinguish his right and title, reliance was placed on the fact that the testator had within eleven years before action visited the defendant as he was in the habit of occasionally doing at the farm in question, and had during his visit lived with the defendant on the farm for a few days, but it is clear, I think, that this was not an entry on the lands and did not operate to put an end to the existing tenancy at will.

An entry by the true owner upon the lands of which his tenant at will is in possession does not operate to determine the tenancy, if the entry is not against the consent of the tenant in such a way that but for the determination of the will he would be liable to an action for trespass: *Doe d. Bennett v. Turner*

(1840), 7 M. & W. 226: (1842), 9 M. & W. 643; *Day v. Day* (supra); *Lynes v. Snaith*, [1899] 1 Q.B. 486. Meredith, C.J.  
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It was further argued that there was evidence from which I ought to draw the inference that a new tenancy at will was created within eleven years before the commencement of the action. It was proved that in 1879 and 1880 the farm in question was assessed in the name of the testator as well as of the defendant, to the former as "freeholder," and to the latter as "owner," and that from 1880 to 1899, inclusive, to both as freeholders, and it was proved that at all events in the year 1882 this was done at the instance of the defendant, and I will assume that the defendant knew of the way in which for each and every of these years the assessment was made.

It was contended on this state of facts that the case of *Doe d. Bennett v. Turner* is an authority for drawing the inference which I am asked to draw, but it does not appear to me that it is. In that case the defendant, after his tenancy at will had been determined, signed an assessment in which he was named as the occupier, and the lessor of the plaintiff as the proprietor, of the land in question, and it was said by Lord Denman that this could hardly be reconciled to any state of things except a rightful tenancy of some sort, and none other appearing, and no rent being paid, there must be a tenancy at will, and at all events the document was evidence to go to a jury as to the creation of a new tenancy: 9 M. & W. at p. 646.

The case in hand is, I think, clearly distinguishable from *Doe d. Bennett v. Turner* for several reasons. There there had been a determination of the tenancy at will; here I have held that there was not; there the defendant described himself as occupier, and here the defendant was assessed not as occupier but as owner; and here all the facts and circumstances point to the conclusion that there never was in fact any change in the character of the defendant's occupation or in the right in virtue of which he was in possession of the farm.

It becomes necessary now to consider the effect of the agreement set up by the plaintiffs and of the acts and conduct of the defendant since the death of the testator on the rights of the parties as I have found them to be at the time of his death.

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The agreement was entered into within a very few days after the death of the testator, and before his will had been opened or the contents of it were known to any of the children of the testator, except James Harvey; no doubt existed as to the validity of the will; the agreement was the result of a suggestion made at an interview between the executor McCowan and the solicitor for the executors, and the object of it was, though this was not known by or communicated to the defendant, or perhaps any other of the beneficiaries, to get rid of any difficulty which might arise if the defendant and Joseph asserted title to the farms of which they had respectively been in possession, under the Real Property Limitation Act, but the defendant did not in fact know of his rights under that statute.

In these circumstances the agreement is not, I think, binding on the defendant.

Although exceptional rules govern transactions in the nature of family arrangements, and agreements of that kind are upheld when, if they had been made between strangers, they would not be binding, it is well settled that even a family arrangement is not binding on one who has joined in it under a mistake as to his rights in the subject-matter, unless it has been fairly entered into without concealment or imposition on either side, with no suppression of what is true or suggestion of what is false, and a statement or suggestion which is false is fatal to the agreement, though it has been innocently made: *Fane v. Fane* (1875), L.R. 20 Eq. 698, and the cases there cited.

*Fane v. Fane* was the case of a false recital as to the right of a father under an existing settlement to charge property which was being resettled by the instrument which was in question in that case, and it was held that the false recital was fatal to it, though it was made under a mistake, because the father was accessory to it.

Applying then the principle of these cases to the facts of this, there was ignorance by the defendant of his rights, the agreement was designed by those who suggested its being entered into to avoid any question being raised as to the ownership of the farm or the rights of the defendant in respect of it; this was concealed, or at all events not disclosed to the defendant; assuming that the defendant in answer to a question by



the solicitor gave the description of the farm to him knowing that it was to be inserted in the agreement, the recital of the ownership of it in fee simple by the testator, if I am right as to the first branch of the case, was untrue, and the other parties to the agreement were as much accessory to the untrue statement as was the father in *Fane v. Fane* to the innocent mistake in the recital which was in question in that case.

It was further argued that the defendant had elected to take under the will, and was therefore bound to pay the charge. It is a sufficient answer to this contention that if there was any election it was made under a mistake as to the defendant's rights; and besides, if the agreement falls, what the defendant did which is relied on as being an election, being a part of the same transaction, must fall with it.

Upon the whole, I am of opinion that the action fails and must be dismissed, but, under all the circumstances, I may, I think, properly leave each party to bear his own costs, and therefore the dismissal, will be without costs.

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## [IN THE COURT OF APPEAL.]

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*Sale of Goods—Future Delivery—Destruction before Measurement—Property Passing.*

Whether the property in goods contracted to be sold has or has not passed to the purchaser depends in each case upon the intention of the parties, and the property may pass even though the goods have not been measured and the price has not been ascertained.

The property in the cordwood in question in this case was held to have passed to the purchaser before measurement, although owing to the destruction of the wood by fire the price could not be ascertained with precision.

Judgment of a Divisional Court, 1 O.L.R. 107, affirmed.

AN appeal by the plaintiff from the judgment of a Divisional Court, reported 1 O.L.R. 107, was argued before OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., and STREET, J., on the 12th of June, 1901. The facts and the authorities relied on are stated in the report below and in the judgment in this Court.

*F. A. Magee*, for the appellant.

• *W. H. Blake*, for the respondent.

December 19. The judgment of the Court was delivered by OSLER, J.A.:—The only question is whether the wood delivered by the defendant at the railway station was there at the plaintiff's risk when it was destroyed by fire. It would be so if the property therein had passed to him, and in that event he must bear the loss, and cannot recover back what he has paid the seller on account of it.

This case illustrates very well the observation of Cresswell, J., in delivering the judgment of the Judicial Committee in *Gilmour v. Supple* (1858), 11 Moo. P.C. 537, at p. 556, as to the ingenuity with which vendors and purchasers contend that the property in goods contracted for has or has not become vested in the buyer, according as it suits their respective interests. It is easy to conceive that, under other circumstances, if the wood had not been destroyed, the parties would have been found taking precisely the opposite view for which they now respectively contend, the plaintiff asserting that the wood had become his, and the defendant or his execution creditor, or another

purchaser, that notwithstanding what is now relied upon as proof of an unconditional appropriation of the wood to the contract, it still remained within the defendant's control or right of disposition as against the plaintiff.

As Wilson, J., said in *Robertson v. Strickland* (1868), 28 U.C.R. 221, in determining the intricate question as to what acts are sufficient between the parties to transfer property in a chattel not made at the time of the contract, but made afterwards, we must ascertain clearly what the precise facts of the case are before we can apply with confidence rules of law settled by many decisions not always concordant, and at times distinguished by some very minute circumstances of difference.

The written contract between the parties of the 23rd of January, 1897, provided for the sale of four different kinds of cordwood, at different prices for each kind, in various quantities amounting in all to 1000 cords, to be cut, drawn out, and delivered beside the tracks of the Canada Atlantic Railway, at the stations known as South Indian and Macauley's Siding, "properly piled, so that it will be in proper merchantable shape when delivered to the party of the second part (the plaintiff) as hereinafter specified." The only other clause in which delivery is mentioned is that in which the terms of payment are specified, viz.: "The present contract is thus made for and in consideration of the following prices (specifying the prices per cord of the different kinds of wood) which the party of the second part undertakes to pay to the party of the first part, as follows: \$1.50 for each cord as the same is delivered and piled at said South Indian and Macauley's Siding, in manner aforesaid, and at the end of each month from this date, but upon which payment the party of the second part will be entitled to stamp the same with his own stamp. The measurement for which payment of \$1.50 per cord will be estimated measurement between the parties; and as to the balance remaining due, the party of the second part agrees to pay the same to the party of the first part on or before the 1st May next, upon final measurement, which shall be arranged mutually between the parties. Should the parties fail to agree as to the correct and final measurement, then party of the second part shall bring a licensed corder from Montreal, at the mutual expense of both

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parties, to wood station, and such licensed corder shall pile and cord twenty cords, and the balance of such wood shall be averaged according to such piled cords."

At the date of the agreement the plaintiff advanced on account of the price \$500, by his promissory note at two months from the 8th of December, 1896.

Under this agreement the parties contemplated: (1) The delivery and piling of the wood at the stations specified, measurable as cordwood, and separated into various kinds; (2) Monthly estimated measurements of the wood thus piled; (3) Monthly payments on account of the whole price of \$1.50 per cord of all kinds of the wood thus delivered, piled, and measured; (4) The stamping of the wood when thus measured, and partly paid for, by the purchaser with his own stamp; (5) Delivery of the whole quantity on or before the 1st of May, 1897; (6) A final measurement of the wood by the parties, or if they could not agree, then by a licensed record at the places where it had been thus delivered, piled, approximately measured and stamped; (7) Payment thereupon of the balance remaining due as ascertained by the final measurement; (8) That the purchaser was not to be at liberty to remove any of the wood until the final measurement had thus taken place, nor probably, until the wood had been paid for.

Had the parties proceeded to carry out this contract according to its terms, I should have thought that their intention, manifest upon the face of the agreement, was that the property in the wood should pass to the purchaser when thus piled, provisionally measured and stamped, at the places specified for its delivery, notwithstanding that the final measurement still remained to be made. That measurement was to be the act not of the seller alone but of both parties or of their common agent, at their joint expense, and of property which in its then condition had been, by their joint assent, appropriated to the contract. Nor do I see what the parties could have had in view in providing that the buyer should be entitled to stamp the wood with his own mark when thus brought to the place at which he was bound to accept delivery, and there provisionally measured and partly paid for, were it not for his protection against any subsequent dealing with it by the seller, by thus

appropriating to the buyer the wood so measured and stamped, as being part of the wood sold to him subject to the subsequent adjustment of the balance of the price.

The parties, however, in the early part of March, 1897, before any of the wood had been hauled to the stations, made a further agreement by which a substantial alteration was made in the terms of the earlier one. It turned out not to be convenient for the defendant to deliver and pile the wood in assorted kinds at the railway stations as he had cut and got it out in the bush all mixed together. He accordingly proposed to the plaintiff that he should be allowed to pile it at the stations just as he hauled it out of the bush, and that he should load it on the cars, sorting and piling it thereon as he did so. This the plaintiff agreed to, provided that the defendant made no charge beyond the usual charge for loading, *i.e.*, should charge nothing for the sorting. What the plaintiff would gain by such an arrangement is not very clear, as he would have had to load it on the cars at his own expense in any case, even had the wood been assorted as delivered alongside the tracks. However, the parties did so agree, and the plaintiff agreed to pay the defendant for the loading twenty cents or twenty-five cents per cord. It was also agreed that the final measurement should be by the plaintiff in Montreal, *i.e.*, that the defendant should accept the plaintiff's measurements there. Thereupon the defendant proceeded to deliver and pile the wood at the stations, and before the 1st of May, 1897, the plaintiff had paid him on account in drafts and notes the sum of \$2000, apparently without any measurement having taken place, but taking the defendant's word for the quantity he had so delivered. On the 1st of May the plaintiff went out with his man to see the wood and to measure it, and in the presence and with the assistance of the defendant measured it as the defendant had piled it, and found it to be 714 cords. This was then, in the defendant's presence, marked by the plaintiff with his own stamp.

Subsequently, upon orders sent by him from time to time, 431 $\frac{3}{4}$  cords of the wood so marked were shipped by the defendant to the plaintiff or his vendees at Montreal. The residue was destroyed *in situ* by fire.

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The plaintiff contended that as the final measurement, as well as the culling and sorting of the wood, still remained to be done, the property in the wood had not passed to him, and therefore that he ought to be repaid the amount which had been overpaid by him on account of the fuel. The defendant, on the other hand, relied upon what was done on the 1st of May, in measuring and marking the wood, as sufficiently manifesting the intention of the parties that the property in the wood so measured and marked should pass or be transferred to the plaintiff.

The general rule undoubtedly is that in the case of an executory contract—a contract for the sale of unascertained or future goods by description—the property does not pass until goods of that description, and in a deliverable state—that is to say, in a state in which the buyer is bound to accept them—are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller: Chalmers on Sale, 4th ed., p. 43; Blackburn on Sale, 2nd ed., p. 128. “From the nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself: but, where certain goods have been selected and appropriated by the seller, and have been approved and assented to by the buyer, then the case stands, as to the vesting of the property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such executory contracts, something more would generally remain to be done, such as, for instance, selection or appropriation, approval, and delivery of *some kind*, before the property would be considered as intended to pass, and upon that taking place the property might pass if it was intended to do so, equally as in the case of a contract for specific and ascertained goods”: *Heilbutt v. Hickson* (1872), L.R. 7 C.P. 438, at p. 449. *Martineau v. Kitching* (1872), L.R. 7 Q.B. 436, was the case of a sale of specific goods on the premises of the sellers, to be paid for by weight, to be ascertained on removal, the actual price being adjusted on the whole being weighed and removed. The defendants paid the approximate price of the whole, and took some of the goods away, but the rest were destroyed by fire before they had been



weighed, and it was contended that as the price had not been finally adjusted, the property in the goods not removed had not passed. It is unnecessary to set forth the other terms of the contract and the facts from which the Court inferred that the property had passed, and that the goods were at the purchaser's risk when destroyed, but I quote the following from the judgment of Cockburn, C.J., reading it in connection with the passage above cited from *Heilbutt v. Hickson*: "It is very true that there are authorities for saying that, where the price remains to be ascertained, the property will not pass. But I think it is equally clear upon the authorities that, according to the view now taken of this branch of the law, the question is one of intention between the parties. I take it now to be perfectly clear, especially after the case of *Turley v. Bates* (1863), 2 H. & C. 200 (S.C. 33 L.J. Exch. 43, *sub. nom. Furley v. Bates*) that the real question in all these cases is whether the parties did intend that the property should pass. . . It is perfectly true, that where anything remains to be done with a view to the appropriation of the thing agreed to be sold by the seller to the buyer, it is plain that the property will not have been intended by him to pass to the buyer, and the property will not have passed. But it is equally clear that, in point of principle, and in point of common sense and practical wisdom, there is nothing to prevent a man from passing the property in the thing which he proposes to sell and the buyer proposes to buy, although the price may remain to be ascertained afterwards. . . If, with a view to the appropriation of the thing, the measurement is to be made as well as the price ascertained, the passing of the property being a question of intention between the parties, it did not pass because the parties did not intend it to pass. But if you can gather from the whole circumstances of the transaction that they intended that the property should pass, and the price should afterwards be ascertained, what is there in principle, what is there in common sense and practical convenience which should prevent that intention from having effect? I protest I can see none." In the same case Blackburn, J., in answer to the argument that as the goods had never been weighed, and the buyer was to pay so much a hundredweight, it never could be ascertained with

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certain precision how many hundredweight there were, says: "The point is concluded by the authority of *Alexander v. Gardner* (1835), 1 Bing. N.C. 671; *Turley v. Bates*, 2 H. & C. 200, and the recent case of *Castle v. Playford* (1872), L.R. 7 Exch. 98, which all go to shew that where the price is not ascertained, and it could not be ascertained with precision in consequence of the thing perishing, nevertheless the seller may recover the price, if the risk is clearly thrown on the purchaser, by ascertaining the amount as nearly as you can."

In the case at bar, it appears to me, after some consideration, that the proper conclusion from the facts is that the property in the wood had passed to the plaintiff.

The effect of the second contract was to make the defendant the agent of the plaintiff, to load the wood upon the cars, culling and assorting it as he did so. Had nothing else occurred after the delivery of the wood at the stations, the property only in so much thereof as the defendant might load on the cars from time to time would have passed to the plaintiff, for the mere delivery at the stations, though it shewed the defendant's intention to appropriate the wood to the contract, would not have been sufficient in the absence of some act done by the plaintiff, or by the defendant as his agent, assenting thereto, to pass the property, and the plaintiff's assent would have been evidenced only by the act of the defendant in loading the wood, done in his quality of agent for the plaintiff for that purpose.

Everything, therefore, turns upon what took place on the 1st of May, and I think it is to be inferred, having regard to the existing circumstances and the terms of the contract between the parties, that when they measured the wood, and the defendant assented to the plaintiff stamping it with his own mark, that it was intended that the property therein should pass then to the latter. This would not be inconsistent with any of the terms of their contract, for the time for the delivery of the whole had then arrived, and the plaintiff had already made advances on account of the price, more than sufficient to pay for all that the defendant had then delivered at the stations. He would, therefore, naturally desire for his own security to have the wood appropriated to the contract, and on the defendant's part there could have been no reason why that

should not then be done, but rather the contrary. Moreover, if it were not for the purpose of manifesting the assent of both parties to the appropriation of the wood to the contract, and their intention to pass the property therein to the buyer, the measurement and marking of the wood on the 1st of May would appear to have been an unnecessary act in view of the agreement of the parties that the seller, as agent of the buyer, was to load and assort the wood upon the cars, and to accept the buyer's final measurement in Montreal. That part of their bargain by which the price was to be finally ascertained remained unaffected, but it was to be performed by the buyer, and the parties were free notwithstanding to agree that the property in the wood as delivered at the stations should, subject to the final ascertainment of the price in this manner, pass to the purchaser.

I think the appeal should be dismissed.

*Appeal dismissed.*

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## [IN THE COURT OF APPEAL.]

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BRANTFORD ELECTRIC AND OPERATING COMPANY

v.

BRANTFORD STARCH WORKS.

*Deed—Description—Falsa Demonstratio.*

By an indenture of lease lessees were given the right to "a sufficient supply of water for the purpose of propelling a wheel not exceeding forty-four inches in diameter, being the size of the present wheel upon the premises." The "present wheel" was forty inches in diameter:—

*Held*, that the governing words were "not exceeding forty-four inches in diameter" and that the subsequent words "being the size of the present wheel upon the premises" should be rejected as *falsa demonstratio*. Judgment of Ferguson, J., reversed, MacLennan, J.A., dissenting.

APPEAL by the defendants from the judgment of Ferguson, J.

The question involved was the construction of the description in a lease in so far as it related to the supply of water to be taken by the lessees. The words in question are set out in the judgments, and the respective contentions of the parties are there given. The second paragraph of the formal judgment issued after the trial declared that the wheel upon the premises in question when the lease was made was a wheel forty inches in diameter and restrained the defendants from taking water in excess of the quantity that was sufficient to work that wheel.

The appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 29th and 30th of May, 1901.

*Armour*, K.C., and *E. Sweet*, for the appellants.

*Shepley*, K.C., and *W. T. Henderson*, for the respondents.

December 20. ARMOUR, C.J.O.:—This appeal turns upon the proper construction to be placed upon the description of the demised premises contained in the indenture of lease bearing date the 3rd of August, 1887, namely, "a sufficient supply of surplus water to be taken from the level of the Brantford canal for the purpose of propelling for any manufacturing purpose except grain milling (which term is not intended to include grinding of grain to be used in the manufacture of starch and the grinding of the refuse thereof) a wheel not exceeding forty-four



inches in diameter, being the size of the present wheel upon the premises, fully described by metes in a deed of conveyance thereof from the said lessor to the said lessees dated July 29th, 1887. The water wheel to be constructed on the best and most approved principles to prevent the waste of water. Provided always that the said lessees, their successors or assigns shall not draw down the level or in any way impede or obstruct the navigation of the said canal."

The contention on the part of the plaintiffs is that the defendants are only entitled to a sufficient supply of surplus water to be taken from the level of the Brantford canal for the purpose of propelling a wheel forty inches in diameter which was the size of the then "present wheel," and the contention on the part of the defendants is that they were entitled to a sufficient supply of surplus water to be taken from the level of the Brantford canal for the purpose of propelling a wheel "not exceeding forty-four inches in diameter."

The plaintiffs' contention is, in effect, that the words "for the purpose of propelling a wheel not exceeding forty-four inches in diameter" must be controlled or modified by the words "being the size of the present wheel," and the defendants' contention is, in effect, that the words "being the size of the present wheel" must be rejected as *falsa demonstratio*.

Now in construing this lease we must be governed by the description contained in it, and cannot travel out of it to consider what the parties may have intended: *Llewellyn v. Earl of Jersey* (1843), 11 M. & W. 183.

And in construing it we have to apply to it the established rules of construction.

"One of these rules is *Falsa demonstratio non nocet*; another is, *Non accipi debent verba in demonstrationem falsam quae competunt in limitationem veram*. The first rule means, that if there be an adequate and sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule is that the description, so far as it is false, applies to no subject at all; and so far as it is true, applies to one only. The other rule means, that if it stand doubtful upon the words whether they import a false reference or demonstra-

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tion, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood": *Morrell v. Fisher* (1849), 4 Exch. 591, at p. 604.

"The distinction is between those cases in which there has been a complete description of the thing given, and a subsequent misdescription as to some particular connected with it, and cases in which that which is subsequently connected with the description is so connected as to form part of the description of the thing given": *per* Lord Cranworth, *Slingsby v. Grainger* (1859), 7 H.L.C. 273, at p. 283.

Applying these rules to the construction of the description contained in this lease there is in the words "a sufficient supply of surplus water to be taken from the level of the Brantford canal for the purpose of propelling a wheel not exceeding forty-four inches in diameter" an adequate and sufficient description with convenient certainty of what was intended to pass, and therefore the subsequent erroneous addition of the words "being the size of the present wheel," the size of the "present wheel" being only forty inches in diameter, cannot vitiate it.

Suppose the size of "the present wheel" had turned out to be sixty inches in diameter, would the lessees have been entitled under the lease to a sufficient supply of surplus water to be taken from the level of the Brantford canal for the purpose of propelling a wheel not exceeding sixty inches in diameter? Or had the size of "the present" wheel turned out to be but thirty inches in diameter would the lessees have been entitled under the lease only to a sufficient supply of surplus water to be taken from the level of the Brantford canal for the purpose of propelling a wheel not exceeding thirty inches in diameter?

It seems to me to be plain that according to the true construction of this lease the defendants are entitled to a sufficient supply of surplus water to be taken from the level of the Brantford canal for the purpose of propelling a wheel not exceeding forty-four inches in diameter, and that the words "being the size of the present wheel" must be rejected as *falsa demonstratio*. And as the defendants are not restricted by the lease in the size of the wheel, otherwise than as to its diameter, they were within their right in using their present wheel.

The learned trial Judge in my opinion properly disposed of all the other questions raised.

And in my opinion the appeal must be allowed with costs, and the action dismissed with costs.

I refer also to *West v. Lawday* (1865), 11 H.L.C. 375; *Dublin and Kingston R. W. Co. v. Bradford* (1857), 7 Ir. C.L. 57; *Chalifour v. Parent* (1901), 31 S.C.R. 224; *Webber v. Stanley* (1864), 16 C.B.N.S. 698; *Smith v. Ridgeway* (1866), L.R. 1 Ex. 331.

OSLER, J.A. :—I cannot say that I am altogether free from doubt as to the proper construction of the grant in the lease of the 3rd of August, 1887, and I am pressed with the view which my brother Maclellan has taken of its meaning.

But upon the whole I think the case is one for the application of the rule of interpretation expressed in the maxim *falsa demonstratio non nocet*.

The general intent of the clause appears to be to confer the right to use a wheel not exceeding a size specified, namely, forty-four inches in diameter. The maximum limit is expressly defined; the grantee may use a wheel of as much smaller diameter as he pleases but must not exceed that specified. The words "being the size of the present wheel upon the premises" refer, I think, to those words which immediately precede them, namely, "forty-four inches in diameter," the actual diameter of the wheel, the right to use which is intended to be conferred.

It was not intended to leave the description open or at large by saying that the existing wheel was one not exceeding forty-four inches and not affirming what its diameter really was, a fact apparently not then actually known to the parties, although they probably believed the diameter to be forty-four inches.

I think, therefore, that a good and definite grant being found in the first branch of the clause the latter, which on the facts appears to be repugnant to and inconsistent with it, must be rejected.

I refer to the cases cited in Beal's Cardinal Rules of Legal Interpretation, pp. 253, 254.

I agree in allowing the appeal.

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Moss, J.A.:—The plaintiffs have not attempted to make a case, and do not ask, for reformation of the instrument of the 3rd of August, 1887, under which the defendants claim the right to draw water from the Brantford canal.

There being no evidence to the contrary, it may be taken that the British America Starch Works, Brantford, George Foster & Co., Limited, the lessees under the instrument in question, had no knowledge that the wheel then in use on the premises was not forty-four inches in diameter. The wheel was not put in by them. It had been in position for a number of years before they acquired an interest in the premises. If anything is to be assumed from the language of the instrument it ought to be that Alfred Watt, the lessor, was aware of its dimensions, and that he was therein representing to the lessees that it was a wheel of forty-four inches diameter.

The British America Starch Works, Brantford, Geo. Foster & Co., Limited, first became interested in the property in question through the acquisition of the rights of James B. Grafton, John S. Grafton, and Joseph Ellis, under a lease to them from the town of Brantford, dated the 1st of January, 1865.

By this lease the town demised to the lessees the parcel of land upon which the defendants' works are situate, together with a sufficient supply of surplus water to be taken from the level of the Brantford canal for the purpose of propelling machinery for the manufacture of woollen cloth equal to fifty horse power, the water wheels to be constructed on the best and most approved principles to prevent the waste of water, for a period of twenty-one years from the 1st of January, 1864, at a yearly rental of \$100, with a right of renewal in perpetuity. Subsequently Watt became the owner of the reversion in the said lease and of all the rights of the town of Brantford in the waters of the Brantford canal, and gave his consent in writing, dated the 22nd of August, 1881, that the water-power demised under the lease might be applied and converted for any manufacturing purpose other than grain milling, provided that no larger water wheel than the one used on the premises on the 2nd of August, 1881, should be used without Watt's consent. By instrument of the 12th of January, 1882, the leasehold premises and all the buildings and improvements thereon, and

the lease and water-power and all the rights of the lessees under the lease, were assigned to the British America Company in consideration of \$9,500. Upon the execution of this instrument the British America Company became the lessees under Alfred Watt as lessor or landlord according to the terms of the original lease as varied by the agreements recited and contained in the assignment. The term of twenty-one years under the lease expired on the 1st of January, 1885. It does not appear whether any proceedings were taken towards a renewal, nor on what terms the parties continued until the 26th of July, 1887. But by deed of conveyance of that date Alfred Watt in consideration of \$1,100 granted and conveyed to the British America Company the lands and premises comprised in the former lease together with another small parcel. And apparently as part of the same transaction, and with a view of securing to the grantees the water-power necessary for the purposes of their works, the instrument which has given rise to this action was executed. This instrument demises and leases "a sufficient supply of surplus water to be taken from the level of the Brantford canal for the purpose of propelling for any manufacturing purpose except grain milling." So far the grant in the old lease as modified by Watt's consent of the 22nd of August, 1881, is substantially followed, but then (leaving out here some explanatory words not essential to the question) it continues, "a wheel not exceeding forty-four inches in diameter." Now if the words stopped here they would express a clear agreement under which the British America Company and their assigns would be entitled to draw sufficient water to propel a wheel forty-four inches in diameter, subject to the subsequent provision that the wheel should be constructed on the best and most approved principles to prevent the waste of water. But the plaintiffs contend that the words which immediately follow, viz., "being the size of the present wheel upon the premises" control the grant and cut down the right to a grant of sufficient water to propel a wheel not more than forty inches in diameter. It is a governing rule for the construction of a contract that if possible a substantial meaning must be given to every part of it. But in endeavouring to give a meaning to every word we must have regard to the surrounding circumstances and the state of know-

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ledge of the parties at the time when the contract was made. We now know that to say that forty-four inches in diameter was the size of the wheel then on the premises was to give an incorrect description of it. But does that knowledge justify cutting down the grant to a right to sufficient water to propel a wheel not exceeding forty inches in diameter? We learn nothing of a wheel forty inches in diameter until it is shewn in evidence in this case. Read without this knowledge the words can only be accepted as explanatory of the actual contract. And whatever may have led the parties to that agreement it seems impossible, without doing violence to the language, to say that they did not agree upon a grant of sufficient water to propel any wheel equalling but not exceeding forty-four inches in diameter that the lessees might put in for the purposes of their business. It does not follow that if the parties had known that the wheel was only forty inches in diameter the new grant would have been limited to the quantity of water sufficient to propel a wheel of that size. It must be borne in mind that under the old lease the British America Company were paying a rental of \$100 per annum for the land and the water-power together, and that they had a right to use water sufficient to give fifty horse-power to their works. By the new agreement they pay \$160 per annum for the right to the water alone. According to the evidence the wheel then in the premises would not give fifty horse-power—not more than forty-one and nine-tenths. It is unlikely that the British America Company would have agreed to be confined to a less horse-power than a renewal of the old lease would have entitled them to and at the same time pay a greatly increased rental for the diminished right.

This merely shews the danger of assuming that a wheel forty inches in diameter was all that was in the minds of the parties. It would be equally dangerous to construe the words of the grant as giving a right to sufficient water for a wheel forty-four inches in diameter, if that was the size of the wheel then on the premises, but subject to be more or less if the wheel was of a greater or lesser size. The parties could scarcely have intended the lessees' rights to depend upon whatever should



ultimately turn out to be the dimensions of the wheel then in the premises.

There being no pretence that the defendants had any part in leading Watt into the contract, or had any knowledge that the wheel was not forty-four inches in diameter as stated in the instrument, or had any notice of any mistake, they cannot be held bound to submit to what is in effect a reformation of the instrument: *Carroll v. Provincial Natural Gas Co.* (1896), 26 S.C.R. 181.

That being so, I think that the second paragraph of the judgment is erroneous.

It may be that the wheel lately put in by the defendants may enable them to draw more water than they are entitled to under the instrument in question. But that question has not been fully tried. The contest at the trial was as between a forty inch wheel and the present one. On the question of the use of water other than surplus water under existing conditions the plaintiffs failed, and I think rightly failed, at the trial.

In my opinion the appeal should be allowed.

LISTER, J.A.:—I agree.

MACLENNAN, J.A.:—I am of opinion that the judgment is right.

The demise is of “a sufficient supply of surplus water to be taken from the level of the Brantford canal, for the purpose of propelling a wheel . . . not exceeding forty-four inches in diameter, being the size of the present wheel upon the premises . . . the water wheel to be constructed upon the best and most approved principles to prevent the waste of water.” At the date of the demise the wheel on the premises was forty inches in diameter. The defendants contend that upon the true construction of the demise they are entitled to a wheel of forty-four inches; while the plaintiffs’ contention is that they may not use one of more than forty inches.

I think that applying the well established rule that all the parts of a deed must if possible have due effect given to them, the contention of the plaintiffs ought to prevail. The words “not exceeding forty-four inches” do not define or limit the

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size of the wheel except as to excess beyond forty-four inches. They plainly mean that it may not be more than forty-four. Then what is the meaning of the subsequent words? They are, "being the size of the present wheel upon the premises." What is it that the participle "being" qualifies? I think it is not "a wheel forty-four inches in diameter," but "a wheel not exceeding forty-four inches in diameter." To say that a wheel forty-four inches in diameter is the size of the present wheel on the premises is to say what is not true; while to say that a wheel not exceeding forty-four inches is the size of the present wheel is in accordance with the actual fact. If the word "namely," or the words "that is to say" were substituted for the word "being," it could hardly be contended that the parties meant nothing by the use of the following words, or that they were *falsa demonstratio*. I think that the meaning is that the size of the present wheel is to govern, provided it do not exceed forty-four inches.

The construction contended for by the appellants involves the total rejection of the words "being the size of the present wheel upon the premises." I think we are not at liberty to do that if they are capable of a meaning consistent with the other language of the demise. In Addison on Contracts, 9th ed., p. 43, the rule of construction is stated thus: "Every contract ought to be so construed that no clause, sentence, or word shall be superfluous, void, or insignificant. Every word ought to operate in some shape or other; *nam verba debent intelligi cum effectu, ut res magis valeat quam pereat*. One part must be so construed with another that the whole may, if possible, stand; but a clause or particular sentence totally repugnant to the general intent of the contract is void, and must be rejected." I think that statement of the law is borne out by the authorities; and I am unable to perceive that there is here any repugnancy which requires the rejection of the words referring to the existing wheel. If the words "not exceeding" had been omitted it might well be contended that it was a case of *falsa demonstratio*; but I think those words make all the difference.

See also, besides the cases referred to by Addison, Elphinstone, Norton & Clarke, p. 76; Pollock on Contracts, 6th ed., p. 233; Chitty on Contracts, 13th ed., p. 136; *Roe v. Tranmarr*

(1757), 2 Sm. L.C. 10th ed., p. 492; *Grey v. Pearson* (1857), 6 H.L.C. at p. 106, *per* Lord Wensleydale; *McConnel v. Murphy* (1873), L.R. 5 P.C. at pp. 218, 219; and *Caledonian R.W. Co. v. North British R.W. Co.* (1881), 6 App. Cas. at p. 131.

*Appeal allowed, MACLENNAN, J.A., dissenting.*

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[IN THE COURT OF APPEAL.]

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AGRICULTURAL SAVINGS AND LOAN COMPANY V. ALLIANCE  
ASSURANCE COMPANY.

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Dec. 31.

*Insurance — Fire Insurance — Renewal — Prior Insurance — Action — Parties — Mortgage.*

The renewal, as it is commonly called, of a contract of insurance is not a renewal or extension of the original contract, but a new contract based as far as applicable upon the original application and in accordance with the policy issued in pursuance thereof. Where, therefore, at the time of such a new contract by way of renewal no prior insurance is in force the insurance is not avoided although when the original contract was entered into prior insurance was in force and this fact was not disclosed.

Judgment of Rose, J., 32 O.R. 369, reversed.

Mortgagees to whom by a policy the loss is made payable as their interest may appear have a right of action upon the policy in their own name against the insurers and are entitled to enforce payment to the extent of their interest. But if in such a case there is no mortgage or subrogation clause containing a direct agreement with the mortgagees they stand in the same position as the mortgagor and their claim may be defeated by any defence which would have been a good defence as against the mortgagor.

*Livingstone v. Western Ins. Co.* (1869), 16 Gr. 9, and *Mitchell v. City of London Assurance Co.* (1888), 15 A.R. 262, followed.

*Omnium Securities Co. v. Canada Fire and Marine Ins. Co.* (1882), 1 O.R. 494, observed upon.

APPEALS by the plaintiffs from the judgment of Rose, J., reported 32 O.R. 369.

The following statement of the facts is taken from the judgment of ARMOUR, C.J.O. :—

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By a policy in the defendant company, under the hand and seal of one of its directors, it was witnessed that one Calvin Randolph Annott, Esq., of the village of Watford, having paid to the defendant company the sum of \$26.25 for the insurance against loss or damage by fire (subject to the conditions and stipulations indorsed thereon which constituted the basis of the insurance) of the property thereafter described, to the amount thereafter mentioned, not exceeding upon any one article the sum specified on such article, namely:—

“\$300. On the building only of his brick, galvanized iron-roofed building, 24 × 45, occupied by the assured as a cold storage building, situate and being on a part of lot No. 27, west side of Main street, village of Watford, Ont., marked No. 1 on diagram, indorsed on assured’s application No. 140312, which forms part hereof, and are his warranty.

\$1200. On his machinery and fixtures therein attached and affixed thereto.

\$1500. Fifteen hundred dollars. Loss, if any, under this policy payable to the Agricultural Savings and Loan Company, London, Ont.

Other concurrent insurance, \$600 on first item and \$700 on second item in Alliance.

Subject to mortgage clause hereto attached.”

And the defendant company did thereby agree that from the 9th day of May, 1898, until twelve o’clock noon of the 9th day of May, A.D. 1899, and for so long afterward as the said insured, his or her or their heirs, executors or administrators, should from time to time pay or cause to be paid the sum of \$26.25 to the defendant company or to the known agents thereof, on or before the commencement of each and every succeeding twelve months, and the board of directors should agree thereto by accepting the same, the funds and property of the defendant company should (subject to the conditions and stipulations indorsed thereon, which constituted the basis of that insurance) be subject and liable to pay, reinstate, or make good to the said insured, his or her or their heirs, executors or



administrators, such loss or damage as should be occasioned by fire to the property therein above mentioned and thereby insured, not exceeding in each case respectively the sum or sums thereinbefore severally specified and stated against each property.

The "conditions and stipulations" indorsed on the policy were not the conditions prescribed by the statute, and this policy must be held to be subject not to the conditions and stipulations indorsed thereon but to the statutory conditions.

The mortgage clause to which this policy was made subject was as follows: "It is hereby provided and agreed that this insurance as to the interest of the mortgagees only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further provided and agreed that the mortgagees shall at once notify said company of non-occupation or vacancy for over thirty days, or of any change of ownership or increased hazard that shall come to their knowledge, and that every increase of hazard not permitted by the policy to the mortgagor or owner, shall be paid for by the mortgagees on reasonable demand from the date such hazard existed, according to the established scale of rates, for the use of such increased hazard during the continuance of this insurance. It is also further provided and agreed that whenever the company shall pay the mortgagees any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once be legally subrogated to all rights of the mortgagees under all the securities held as collateral to the mortgage debt, to the extent of such payment, or at its option the company may pay to the mortgagees the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt, but no such subrogation shall impair the rights of the mortgagees to recover the full amount of their claim. It is also further provided and agreed that, in the event of this property being further insured with this or any other office on behalf of the owner or mortgagee, the company, except such

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other insurance when made by the mortgagor or owner shall prove invalid, shall only be liable for a rateable proportion of any loss or damage sustained.

At the request of the assured, the loss, if any, under this policy is hereby made payable to the Agricultural Savings and Loan Company as their interest may appear, subject to the conditions of the above mortgage clause."

The plaintiffs were the mortgagees of the insured property, by virtue of a mortgage bearing date the 7th day of May, 1898, made by Calvin Randolph Annott and one James Annott, who executed the same as surety for the payment of the mortgage money, in pursuance of the Act Respecting Short Forms of Mortgages, securing payment to them of the sum of \$3000 and interest, as therein set forth, which said mortgage contained the following covenant: "And that the said mortgagors will insure the building on the said lands to the amount of not less than three thousand dollars currency."

C. R. Annott, in his application for this policy, in answer to the question, "What other insurances and where? Name companies and amounts," said, "\$1500 on above property just being taken to-day in the Alliance Assurance Company," and by this application the applicant agreed with the defendant company "that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk and agrees and consents, that the same be held to form the basis of the liability of the said company, and shall form a part and be a condition of this insurance contract;" and on the margin of the application appeared these words: "Loss, if any, payable to the Agricultural Savings and Loan Company, London, Ont., as their interest may appear."

Prior to the date of this policy, and on the 25th day of April, 1898, C. R. Annott had insured the property covered by this policy in the Perth Mutual Fire Insurance Company for three years from that date, in the sum of \$4000, which insurance was on the 14th April, 1899, cancelled by that company.

The insurance effected by this policy was renewed by the following renewal receipt:—

"The Liverpool and London and Globe Insurance Company.

Receipt

Renewing Policy

No. 160389.

No. 3732312.

Sum insured, \$1500.

Premium, \$26.25.

Received the 9th day of May, 1899, from C. R. Annott, Esq., the sum of twenty-six 25/100 dollars, being the premium for the renewal of policy above named, to the ninth day of May, nineteen hundred.

Not valid until countersigned by the company's authorized agent at Watford.

Countersigned at Watford

G. F. C. Smith,

this 8th day of May, 1899.

Resident Secretary,

W. E. Fitzgerald, Agent.

Canada Branch."

C. R. Annott left the country on the 2nd February, 1900, and on the 5th February, 1900, G. F. C. Smith, the chief agent of the defendant company, wrote to W. E. Fitzgerald, its agent at Watford, as follows: "Your favour of the 29th ult. came duly to hand, and we showed your letter to the Alliance as requested. They also advised us of their inspector's report of the premises insured. It would appear that the refrigerating plant is of no value, and that the property does not warrant the present amount of insurance. We would prefer, under the circumstances, not to continue on the risk, and would ask you to obtain the surrender of the policy, allowing a rebate of \$5.75 for the unexpired term, which you will please pay and take credit for in your account, less commission."

On the 8th February, 1900, G. F. C. Smith, chief agent of the defendant company, wrote to the plaintiffs as follows:—

"Re policy No. 3732312. J. R. Annott, of Watford.

"In the absence of J. R. Annott from Watford, we write you direct to advise you that on account of the cold storage building insured under the above policy being unoccupied, we do not care to continue on the risk. Will you, therefore, please return us the above policy with your release, in cancellation thereof. Our agent Mr. Fitzgerald, of Watford, will pay Mr. Annott the amount of unearned premium, \$5.75, and obtain his discharge."

On the 9th February, 1900, the plaintiffs' manager wrote to James Annott a letter, on the margin of which there was this memo.: "Have just received notification from Insurance Co. cancelling their policy."

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On the 12th February, 1900, G. F. C. Smith, chief agent of the defendants, wrote to W. E. Fitzgerald, their agent at Watford, as follows:—

“*Re* policy 3732312. Annott.

In reply to your post card of the 7th inst., we would say that we had already written to the Agricultural Savings and Loan Company, of London, calling for the cancellation of the above policy. We would prefer to go off the risk at once.”

On the 13th February, 1900, Mr. Fitzgerald wrote to the plaintiffs as follows: “To-day I received by book-post, and I suppose it was from you, two insurance policies issued to C. R. Annott, one policy being number 3732312 in the Liverpool and London and Globe Insurance Co., and the other policy being 1572474 in the Alliance Assurance Co. In your letter that you wrote me the other day you stated that these policies had been cancelled. The company have so written me also; and, therefore, since these policies are cancelled, it may be necessary for you to effect insurance in other companies. I have one other company that I do insurance business for namely, the Wellington Mutual Fire Ins. Co., which is a stock company as well as mutual. I do not know whether I could get them to take a risk say of \$2000 on this building or not. If you have already insured the building let me know. If not, I can endeavour to place on an insurance for you in the Wellington Mutual. Annott is not here at present. I have credited him with the rebate that is coming to him in respect of these policies. I may further say that I did all I could with the Alliance Assurance Co. and the Liverpool and London and Globe Ins. Co. to allow the said insurance to remain in force, but the inspector of the Alliance Assurance Co. having a few weeks ago been here and made his report as to the building not being used for cold storage purposes now, etc., caused the companies to come to the decision they have and thus cancel the insurance. To-day both of said companies wrote me their letters, being dated yesterday. They positively refuse to reconsider the matter of cancellation, and state they wish policies to remain cancelled, or words to that effect. P.S.—Before Annott’s property mortgaged to you becomes less valuable, etc., would it not be well to sell and make what you can out of it.

Nothing, I think, can be made by proceeding against James Annott, whom his son has carried financially, but he, J. A., says he will, if given time, pay you what you cannot get out of cold storage buildings some day if let alone."

On the 14th February, 1900, the plaintiffs' manager wrote to Mr. Fitzgerald as follows: "*Re* Annott property. If you can place \$2000 insurance in any company you had better do so. The rebate of the insurance policies must be paid to us and not, as you suggest, credited to Annott, so kindly send us cheque for same."

On the 15th February, 1900, Mr. Fitzgerald wrote to the defendant company as follows: "*Re* policy No. 3732312. The Agricultural Savings and Loan Company have sent me this policy, and I wrote them I had credited rebate to Mr. Annott, which is \$5.75. The Agricultural Loan Company want rebate themselves. The insured is, I think, entitled to rebate, and he being indebted to me, I have surely a right, as in the past, to credit him with it in his account. What will I do with policy, and what else do you wish me to do? How about rebate? I do not intend paying Loan Company if not bound to."

On the 15th February, 1900, Mr. Fitzgerald wrote to the plaintiffs as follows: "Your letter of yesterday's date received. I will place \$2000 insurance in Wellington, subject to their approval, on getting premium from you say \$1.35 per \$100 insurance for twelve months or \$27. Please reply by next mail. The assured is party to get money, and he has got it and is overpaid. He is indebted to me, and allows credit in this way."

On the 16th February, 1900, G. F. C. Smith, chief agent of the defendant company, wrote to Mr. Fitzgerald, their agent at Watford, as follows:—

"*Re* policy No. 3732312. Annott.

"We have your post card of the 15th inst. advising that the mortgagees, the Agricultural Savings and Loan Co. have returned you the above policy for cancellation, and that you advised them that you would credit Mr. Annott with the rebate, but that the Loan Company demand the rebate themselves. If the premium was paid by Mr. Annott, you are entitled to retain it for him, but if it was paid by the Loan

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Company you will have to pay it to them. Strictly speaking, the only interest the Loan Company has in the policy is in the event of a loss by fire; they have no title to or in the policy except in such event. You will please return us the policy and take credit for the rebate, less commission, in your current account when you have received the discharges on the policy itself, signed by both parties."

On the 16th February, 1900, the plaintiffs' manager wrote to Mr. Fitzgerald as follows: "You might make application to the Wellington Mutual and ascertain whether they will care to accept the risk; if they do so, then I think there will be no difficulty in paying you the premium, though it is a very high one, especially on that class of security, and if it was occupied it would be a very much less rate."

On the 17th February, 1900, Mr. Fitzgerald wrote to the plaintiffs as follows: "Your letter of February 16th received. I have written the Wellington Mutual giving full particulars of risk and asking whether they will accept the offer of \$2000, being \$900 on the building, the same as the old policies, and \$1100 on the fixtures and machinery attached and affixed thereto. I will advise you whether they accept or not. The rate quoted is not any higher than if building were occupied. I have heard from both the Liverpool and London and Globe and the Alliance companies respecting cancellation of their respective policies, and stating that when Annott paid me the insurance premium, he was the party to receive the rebate and not you, therefore I was correct in saying that he was entitled to get it. Rate is only \$1.35 per \$100. Total premium, \$27."

On the 20th February, 1900, the plaintiffs telegraphed the manager of the defendant company as follows: "Annott policy, No. 3732312. Buildings destroyed by fire last night."

And on the 20th February, 1900, the plaintiffs' manager wrote to the chief agent of the defendant company as follows:—

"*Re* policy 3732312. C. R. Annott. I yesterday wired you that the premises covered by above policy had been destroyed by fire. We take the position that the policy had never been cancelled, and we must ask you to return the policy to us, or if you do not hold it, to instruct your agent at Watford, Mr. W. E. Fitzgerald, to return it to us, and we can then make



our claim in the usual manner. Kindly also forward me a set of claim papers."

This policy, when produced at the trial, had the following attached to it:—

"*Re* policy No. 3732312. C. R. Annott.

In consideration of the sum of \$5.75 return premium, the above policy is cancelled and surrendered to the Liverpool and London and Globe Ins. Co.

C. R. Annott.

*Per* W. E. Fitzgerald,

Feby. 13th, 1900.

his solicitor."

The premises insured were used for the purpose of cold storage, the machinery being propelled by a gasoline engine, and, when worked, there was an engineer employed in the day time and one at night. The business of cold storage ceased towards the end of September, 1899, owing to the machinery not working properly, and the premises were thereafter used for ordinary storage purposes for the business carried on by C. R. Annott of buying and selling produce, and this business ceased about the 16th January, 1900, leaving about 1000 boxes, which were all removed but about 75 at the time of the fire.

When C. R. Annott went away, he left the keys with his father, who left them with his son-in-law, who had a shop in the village.

On the day C. R. Annott left the country, a judgment was obtained against him for \$2,200.

On the 1st May, 1900, there was due to the plaintiffs in respect of their mortgage the sum of \$2,052.56.

The defendant company, claiming the right to avoid the insurance, offered to return the amount of the premiums received by them in respect thereof, together with interest thereon.

#### AGRICULTURAL SAVINGS AND LOAN COMPANY V. ALLIANCE ASSURANCE COMPANY.

The only distinction between this case and that of this company against the Liverpool and London and Globe Insurance Company, is that in this case the policy is not under seal, there is no "mortgage clause," and there is a variation of the

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third statutory condition by striking out the words "and within the control or knowledge of the assured," and substituting therefor the words "or vacancy for a period exceeding fifteen days."

The appeals were argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 14th and 15th of May, 1901.

*Aylesworth*, K.C., and *Bayly*, K.C., for the appellants.

*A. Hoskin*, K.C., and *A. E. Hoskin*, for the respondents, the Liverpool and London and Globe Insurance Company.

*Riddell*, K.C., and *H. E. Rose*, for the respondents, the Alliance Assurance Company.

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November 6. ARMOUR, C.J.O. (after stating the facts as above set out) This action was, in my opinion, well brought by the plaintiffs.

The policy is by deed, and it is not a deed *inter partes* but a deed poll.

If the policy had been by deed *inter partes*, it might have been contended that no one could have sued on it but those between whom, on the face of it, the deed was made.

But the policy is by deed poll, and any one named or designated in it, with whom a covenant is thereby made, can sue upon it: *Green v. Horne* (1693), 1 Salk. 197; S.C. Comberbach 219; Platt on Covenants, p. 5; Hamilton on Covenants, p. 6; *Sunderland Marine Ins. Co. v. Kearney* (1851), 16 Q.B. 925; *Mitchell v. City of London Fire Ins. Co.* (1886), 12 O.R. 706.

The stipulation in the policy, "loss, if any, under this policy payable to the Agricultural Savings and Loan Company, London, Ont.," constituted a covenant on the part of the defendant company to pay to the plaintiffs the loss, if any, under the policy: *Bower v. Hodges* (1853), 13 C.B. 765.

It is not against this view that the defendant company covenanted "to pay, reinstate, or make good to the said insured" such loss, for this covenant was subject to their covenant with the plaintiffs, and payment to the plaintiffs of such

loss as their interest might appear would be a discharge *pro tanto* of this covenant.

In this case the policy not being technically a deed *inter partes*, the plaintiffs were as much parties to it as was C. R. Annott.

By his mortgage he was bound to insure to the amount of \$3000, and in his application he set forth this mortgage, and asked that the loss, if any, should be made payable to the plaintiffs, the mortgagees, as their interest might appear.

The defendant company were therefore aware that C. R. Annott was the mortgagor and the plaintiffs were the mortgagees of the property to be insured, and that the loss, if any, was to be made payable to the plaintiffs as such mortgagees, and being so aware, they issued this policy: *Hathaway v. Orient Ins. Co.* (1892), 134 N.Y. 409; *Watertown Fire Ins. Co. v. Grover, etc., Co.* (1879), 41 Mich. 131.

And if any thing were wanting to shew that the plaintiffs were parties to this policy, it is supplied by the mortgage clause to which the policy is made subject, which contains express agreements between the plaintiffs and defendant company.

In taking the view which I have expressed, I am not to be understood as at all dissenting from the decision of this Court in *Mitchell v. City of London Assurance Co.* (1888), 15 A.R. 262, which must be held to govern this case.

The non-communication to the defendant company by C. R. Annott in his application of the fact of the existence of the prior insurance in the Perth Mutual Fire Insurance Company, is set up as an answer to the plaintiffs' claim, it being contended that although the insurance in that company was cancelled before the renewal of the policy sued on, the defendant company, notwithstanding their renewal of the policy, had the right as soon as they discovered the fact of its non-communication, which was shortly before the fire, to avoid the policy, and the learned trial Judge agreed with this contention, and on this ground dismissed the action.

"As to the effect of a renewal of a policy there is some confusion, if not disagreement, amongst the authorities. It is generally held to be a new contract upon the terms and conditions stated in the policy expired—the old application, in the

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absence of evidence to the contrary, serving as the basis of the new contract, and as if made at the date of the renewal:" May on Insurance, 4th ed., sec. 70a.

I am of the opinion that the renewal of the policy sued on must be held to be a new contract upon the terms and conditions of that policy, for our law provides that "the insurance of mercantile and manufacturing risks shall, if on the cash system, be for terms not exceeding one year:" R.S.O. 1897 ch. 203, sec. 167. And this was an insurance of a mercantile risk as understood by insurers, as was shewn by the tariff of rates for such risks put in evidence at the trial, and was on the cash system.

I am of the opinion, moreover, that, apart from this statute, the renewal of the policy sued on must be held to be a new contract upon the terms and conditions of that policy: *Long v. Ancient Order of United Workmen* (1898), 25 A.R. 147; *Brady v. Northwestern Ins. Co.* (1863), 11 Mich. 425.

If a new contract, it was entered into without any application, such as was made for the former contract, being required to be made, and if any effect is to be given to the old application as applied to the new contract, it must be treated as practically a new application for the new contract made at the date of the new contract, and being so treated, the contention of the defendant company must fail.

The contention of the defendant company that the policy was cancelled, must also fail.

It was admitted that the proceedings prescribed by the 19th statutory condition for terminating the insurance had not been taken.

But it was contended that the insurance was terminated in the only other way in which it could be terminated, namely, by the agreement of the parties; but C. R. Annott never did agree, nor did he ever authorize any one, nor was any one ever authorized to agree for him: *Caldwell v. Stadacona Fire and Life Ins. Co.* (1883), 11 S.C.R. 212; *Morrow v. Lancashire Ins. Co.* (1898), 29 O.R. 377; (1899), 26 A.R. 173.

I do not think that there was any change material to the risk within the terms of the 3rd statutory condition, as was contended by the defendant company, and that if there was,



the plaintiffs were protected against it by the provisions of the "mortgage clause."

The plaintiffs are, in my opinion, entitled to recover upon the policy, but only to the extent of the amount due upon their mortgage.

OSLER, J.A.:—I agree in the result, for the reasons which will appear in my judgment in the following case.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

*Appeal allowed.*

AGRICULTURAL SAVINGS AND LOAN COMPANY V. ALLIANCE  
ASSURANCE COMPANY.

December 31. ARMOUR, C.J.O.:—All the questions raised in this case were disposed of by our decision in the case of these plaintiffs against the Liverpool and London and Globe Insurance Company, recently disposed of by this Court, except the question whether the plaintiffs were entitled to maintain their action upon the policy in this case.

In *In re Rotherham Alum and Chemical Company* (1883), 25 Ch. D. 103, Lindley, L.J., said: "An agreement between A and B that B shall pay C, gives C no right of action against B. I cannot see that there is in such a case any difference between equity and common law; it is a mere question of contract."

And in *In re Empress Engineering Company* (1880), 16 Ch. D. 125, it is said: "A mere agreement between A and B that B shall pay C (an agreement to which C is not a party either directly or indirectly) will not prevent A and B from coming to a new agreement the next day, releasing the old one."

And in *Gandy v. Gandy* (1885), 30 Ch. D. 57, Cotton, L.J., said: "Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as *cestui que trust* under that contract,

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then B would, in a court of equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated."

By his mortgage to the plaintiffs, C. R. Annott covenanted to insure the mortgaged premises to the amount of \$3000, and to assign the policy to the plaintiffs, and in his application for insurance to the defendants he stated this mortgage, and asked the defendants to make the loss, if any, payable to the plaintiffs as their interest might appear.

The defendants were therefore aware that C. R. Annott was the mortgagor and the plaintiffs were the mortgagees of the property to be insured, and that the loss, if any, was to be made payable to the plaintiffs as such mortgagees, and to this they assented and issued the policy accordingly, with the stipulation contained in it, "loss, if any, payable to the Agricultural Savings and Loan Company of London, Ont., as their interest may appear."

The effect of the covenant to insure was to give the plaintiffs an equitable lien on the money secured by the policy to the extent of their interest, and this was not only assented to by the defendants, but they expressly agreed to pay it: *Garden v. Ingram* (1852), 23 L.J. Ch. 478; *Watt v. Gore District Mutual Ins. Co.* (1861), 8 Gr. 523; *Greet v. Citizens Ins. Co.* (1879), 27 Gr. 121; (1880), 5 A.R. 596.

I am of the opinion that, under these circumstances, the plaintiffs were parties to the policy in this case, and were entitled to maintain this action thereon to the extent of the amount due upon their mortgage: *Hathaway v. Orient Ins. Co.*, 134 N.Y. 409; *In re Policy No. 6402*, [1902] 1 Ch. 282.

This case is, moreover, governed, so far as this Court is concerned, by *Mitchell v. City of London Assurance Co.*, 15 A.R. 262.

The appeal will, therefore, be allowed with costs here and below.

OSLER, J.A.:—There is, in this Court at all events, no difficulty in holding that these plaintiffs can maintain an action in their own name; the policy being, on the face of it, expressed, loss, if any, payable to them as their interest may appear.

They are interested as mortgagees, and the policy was obtained by the mortgagor, the owner of the property insured, in pursuance of a covenant with the plaintiffs, the mortgagees, to that effect: *Greet v. Citizens Ins. Co.*, 5 A.R. 596. They are in effect assignees of the policy.

The plaintiffs' right to sue in their own name in equity upon a policy of insurance expressed, as the policy in this case is expressed, is conceded in the judgment of this Court, as formerly constituted, in *Livingstone v. Western Ins. Co.* (1869), 16 Gr. 9. It was held, however, that the mortgagor still remained the person insured, and that the mortgagees' claim was liable to be defeated by anything which would be a defence to the insurance company against the mortgagor. In the case of *Mitchell v. City of London Assurance Co.*, 15 A.R. 262, where the question was very fully examined, and the authorities cited, the right of the mortgagee to sue on such a policy, subject to the same limitations, was established; and the mortgagee succeeded there because the defendants failed to prove the breach of the condition of the policy, which they had set up as a defence.

In the case of these plaintiffs against the *Liverpool and London and Globe Insurance Company*, which was argued at the same time as the appeal in the present case, and in which we have just given judgment the policy of insurance contained what is known as the subrogation or mortgage clause—which is a contract by the company directly with the mortgagees, and in terms expressly renounces the right of the company to set up, as a defence against the mortgagees, any act or neglect on the part of the mortgagor. There was, therefore, no difficulty in holding in that case that neither the omission of the insured to communicate to the insurance company the existence of the policy in the Perth Mutual Fire Insurance Company, nor the alleged change of occupation, was any answer to the action on the policy at the suit of the mortgagees, whose right to sue did not rest solely upon the "loss, if any," clause.

That was the ground on which I placed my judgment in that case; adopting the reasoning of Miller, J., in *Hastings v. Westchester Fire Ins. Co.* (1878), 73 N.Y. 141, as to the operation and meaning of the mortgage clause.

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I do not overlook the case of *Omnium Securities Co. v. Canada Fire and Marine Ins. Co.* (1882), 1 O.R. 494. That case was settled between the parties after an appeal had been argued in this Court, but before judgment was delivered.

In the case at bar, the policy contains no mortgage clause, and the defendants are entitled to rely, as a defence against the mortgagees' claim, upon any ground on which they could have defeated a claim by the mortgagor, the insured, if he were suing. In other words, though they may sue in their own name, they stand simply in the shoes of the insured, just as the plaintiff did in the case of *Mitchell v. City of London Assurance Company*.

The only defences open to them after our decision in the *Liverpool and London and Globe* case, are the non-disclosure by the insured in his application for the original policy of insurance, of the policy in the Perth Mutual Fire Insurance Company, and the defence arising out of the alleged change of occupation under the third statutory condition.

It is the fact that when the insurance now in question was effected, or renewed, or continued, whatever may be the proper way to describe what was done by the renewal receipt issued by the defendants on the 9th of May, 1899, the insurance in the Perth Mutual Fire Insurance Company had long ceased to exist, so that, taking the application on which the policy had issued on the 9th of May, 1898, to be made as of the date of or for the purpose of the renewal and as descriptive of the existing conditions, it was actually true, and contained no misrepresentation. I can see no reason why that view should not be taken of the application, especially as the policy contains no such clause as was found in that in question in *Howard v. Lancashire Ins. Co.* (1885), 11 S.C.R. 92, providing that all insurance should be considered as made under "the original representation," whatever that may mean. Moreover, the policy, as the insurance of a "mercantile risk," was by law a policy for one year only, and if the company had issued a new policy for the following year upon the old application, I think the latter would have to be read not as containing a false representation of the state of things existing at its date, but as a representation of the state of things existing when the new policy was applied for—not



making it false by relation to a time then not material, but testing its truth by applying its terms to existing conditions. Instead of issuing another policy, the company adopted, as the Act enables them to do, the usual and convenient alternative of issuing a renewal receipt, which is in effect a new policy for another year, and in relation to which, in my opinion, the application must be read and construed in the same way as if a formal policy had been issued.

I think the true construction of sec. 167, sub-secs. 1 and 2, of the Ontario Insurance Act, R.S.O. 1897 ch. 203, invites and warrants this conclusion.

As to the defence under the third statutory condition, I am of opinion, after carefully examining the evidence relied upon in support of it, that even if there was in fact anything which amounted to a change of occupation, it was one, under the circumstances, not material to the risk, and, therefore, that this defence also fails.

On the whole, I think the appeal should be allowed and judgment entered for the plaintiffs. The parties can, no doubt, agree upon the amount. If not, there must be a reference to the proper officer to ascertain it, having regard to the fact that a judgment for the same loss has been recovered against the other company.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

*Appeal allowed.*

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[IN CHAMBERS.]

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RE TOUGHER.

Dec. 16.

*Surrogate Courts—Administration—Order of—Application for, in more than one Surrogate Court.*

When applications for letters of administration to the estate of a deceased person are made in more than one surrogate court, preference will be given to that made by the party nearest in the order in which administration is usually granted, and jurisdiction to proceed was conferred on the surrogate court in which application was made by a mother as next-of-kin against that on behalf of creditors, in another county.

THIS was an application made under sec. 48 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, for a direction as to which of two surrogate courts had jurisdiction to issue letters of administration when applications were made in different surrogate courts by a mother as next-of-kin and by a trust company on behalf of creditors.

The application was argued in Chambers on December 13th, 1901, before MACMAHON, J.

*James Bicknell*, for the next-of-kin.

*J. H. Moss*, for the trust company.

December 16. MACMAHON, J.:—According to the certificate of the surrogate clerk, it appears that on the 16th of July, 1901, notice of application for grant of letters of administration from the registrar of the surrogate court of the county of Lambton, of the property of Thomas C. Tucker or Tougher, late of Spokane, Washington, railway employee, who died on or about the 17th day of January, 1892, was received by him.

And he further certifies that on the 24th day of July, 1901, notice of application for grant of letters of administration from the registrar of the surrogate court of the county of Brant, of the property of Thomas C. Tougher or Tucker, late of Spokane, Washington (no addition), who died on or about the 17th day of January, 1892, was received by him.

The latter application was made by Eleanor Tougher, the mother of the deceased.

An application has been made to me under sec. 48 of the Surrogate Courts Act, R.S.O. 1897 ch. 59, for a direction as to which of the surrogate courts should have jurisdiction in the matter.

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From the affidavits it appears that Thomas C. Tougher died in January, 1892, in the State of Washington, having his fixed place of abode at Spokane in that State. He was a bachelor, and died without making a will.

At the time of his death he was entitled to a legacy of \$500 under the will of his father, Robert Tougher (of the township of Burford, in the county of Brant), which made such legacy a charge upon certain farm lands situated in the county of Lambton, willed by the said Robert Tougher to another son, William S. Tougher.

Besides the said legacy charged on the said farm, Thomas C. Tougher left at the time of his death personal property in the county of Brant of the value of about \$20.

At the time of his death, Thomas C. Tougher left, as his only next-of-kin, his mother Eleanor Tougher, and his brothers James, Robert, William S., and Aaron N., and his only sisters Margaret Ann Costin, Sarah Jane Brown, Elizabeth Helen Tougher, and Mary Tougher (the last named died unmarried and without issue in the year 1899).

Aaron N. Tougher, Margaret Ann Costin, Sarah Jane Brown, Elizabeth Helen Tougher, and Robert Tougher have renounced all right to letters of administration to the estate of the said Thomas C. Tougher in favour of their mother Eleanor Tougher.

The application to the surrogate court of the county of Lambton for letters of administration was made by the London and Western Trusts Company (Limited) under instructions from William S. Tucker and James Tucker (or Tougher), two of the brothers of the deceased Thomas C. Tougher. They claim to be creditors of the estate of the deceased to the extent of \$200 for bringing his body from Spokane to the county of Brant, where it was buried.

The order in which administration is usually granted is: (1) Husband or wife; (2) child or children; (3) grandchild or grandchildren; (4) great grandchildren or other descendants;

MacMahon, J. (5) father; (6) mother; (7) brothers or sisters: Howell's Probate Practice, 2nd ed., p. 129; Williams on Executors, 9th ed., 1901 p. 361.  
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In *Ratcliffe's case*, 3 Co. 40 (cited in Williams on Executors, p. 359), it is said, "If a child dies intestate without a wife, child, or father, the mother is entitled to administration."

The prior right of the mother to administration must be a not unimportant factor in determining upon which Court jurisdiction should be conferred to proceed in the matter, and I direct that the surrogate court of the county of Brant shall proceed therein.

The London and Western Trusts Company (Limited), must pay to Eleanor Tougher the costs of this application and the costs of opposing the application to the surrogate court of the county of Lambton.

G. A. B.

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[FALCONBRIDGE, C.J.K.B.]

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THE BANK OF MONTREAL v. HATCH ET AL.

July 15.  
Dec. 9.

*Execution—Seizure by Sheriff—Bank Notes Paid in a Bank—Property in the Money.*

A superannuated civil servant having presented his certificate at the wicket of a bank, which paid superannuation allowances for the Government, the teller counted out the amount in notes and placed them on the ledge in front of the wicket, when, before the payee had touched it, the money was seized by a sheriff's bailiff under an execution against him:—

*Held*, that the property in the money had passed to the payee as soon as it had been placed upon the ledge, and that the execution creditor was entitled to it.

Judgment of the local Master at Ottawa affirmed.

THIS was an appeal from a judgment of the local Master at Ottawa in an interpleader issue between the Bank of Montreal as claimant, against one Walter Hatch, as execution creditor, and the sheriff of the county of Carleton, directed in an action in the High Court of *Hall v. Hatch*, the defendant Hatch having recovered a judgment and issued execution against the plaintiff Hall.

The issue was directed at the instance of the sheriff, to try the right to a certain fund in his hands, which was claimed by the Bank of Montreal as well as by the execution creditor, the defendant Hatch. The plaintiff Hall claimed the same money from the bank, or alternatively, for the return of his pension certificate or cheque; and, by the consent of all parties, the bank's claim to the money so seized and also Hall's claim over against the bank were disposed of summarily by the Master at Ottawa under Con. Rules 1110 and 1111.

The matter was argued before Mr. W. L. Scott, the local Master at Ottawa, on the 27th of June, 1901.

*J. F. Orde*, for the Bank of Montreal.

*Travers Lewis*, for Charles R. Hall, execution debtor.

*R. V. Sinclair*, for Walter Hatch, execution creditor.

*Geo. F. Henderson*, for the sheriff.

The local Master gave the following judgment:—

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July 15. THE LOCAL MASTER:—This is an interpleader application made on behalf of the sheriff of the county of Carleton. The facts are not in dispute, and are as follows:—

The plaintiff Hall is a superannuated civil servant entitled to receive the sum of sixty-three dollars per month from the Receiver-General of Canada through the Bank of Montreal.

On the 27th of May, 1901, he went to the Ottawa office of the bank and there presented to the paying teller the usual superannuation declaration for the purpose of drawing his allowance for the month of May.

The teller took up the declaration, counted out the sum of sixty-three dollars in notes and placed them upon the ledge in the wicket which communicates between the teller's box and the outer office of the bank, in front of Hall, for him to take up. After the teller had removed his hand from the notes, and while they were still lying upon the ledge, but before they had been in any way touched or handled by Hall, they were seized by a sheriff's bailiff, under an execution issued at the suit of the execution creditor Hatch.

Hall, through his solicitors, subsequently demanded payment of the sixty-three dollars from the bank, and the latter thereupon made a claim on the money in the sheriff's hands.

When the matter came before me the sheriff's right to interplead was not disputed, and all parties were agreed that instead of directing an issue, I should dispose summarily of the matters in dispute, under the provisions of Rules 1110 and 1111. The plaintiff Hall also consented to come in and, in order to save expense, he and the bank agreed that their rights *inter se* should be determined here, without further litigation.

At common law the sheriff had no authority to seize money. This right was first conferred in England by 1 & 2 Vict. ch. 110, sec. 12, and in Canada by the old Common Law Procedure Act of 1856, 20 Vict. ch. 57, sec. 22. The legislation at present governing the matter is sec. 18 of the Execution Act, R.S.O. 1897, ch. 77, which reads: "The sheriff or other officer having the execution of a writ against goods . . . shall seize any money or bank-notes . . . belonging to the person against whose effects the writ of execution has issued," etc.

The question on the answer to which the decision of this case depends, therefore, is, had the property in the notes passed to Hall at the moment when the sheriff's bailiff seized them? If they were at that moment "belonging" to Hall they were liable to seizure, but not otherwise.

Among the numerous cases cited on the argument, the one which throws most light on that question is *Chambers v. Miller* (1862), 13 C.B.N.S. 125, also reported 32 L.J.C.P.N.S. 30. The facts of the case were as follows. The plaintiff presented a cheque at the defendants' banking-house. The defendants' cashier counted out the amount in notes, gold, and silver, and placed it on the counter and went away. The plaintiff drew the money towards him, counted it over, and was in the act of counting it a second time, when the cashier (who had in the meantime ascertained on enquiry that the account of the drawer was overdrawn) returned and said that the cheque could not be paid. The plaintiff, however, having possession of the money, put it in his pocket, whereupon the cashier detained him until he returned the money, under a threat of giving him into custody on a charge of stealing it. Upon these facts it was held that the property in the notes had passed from the bankers to the bearer of the cheque, and that the payment was complete and could not be revoked. I shall quote some passages from the judgments, which I think will afford assistance in dealing with the present case.

Erle, C.J., says, at pp. 132, 133: "When a cheque is presented at the counter of a banker, the banker has authority on the part of his customer to pay the amount therein specified on his account. The money in the banker's hands is his own money. On presentment of the cheque, it is for the banker to consider whether the state of the account between him and his customer will justify him in passing the property in the money to the holder of the cheque. In this case, the banker's clerk had gone through that process, and so far as in him lay did that which would pass the property in the money to the plaintiff. He counted out the notes and gold and placed them on the counter for the plaintiff to take up. It no longer remained a matter of choice or discretion with him whether he would pay the cheque or not. The plaintiff had taken possession of the

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money, counted it once, and was in the act of counting it again, when the clerk, who had gone from the counter, . . . returned and claimed . . . to have the money back. Now, the bankers had parted with the money, and the plaintiff had accepted it. It is true he had not finished counting it, and that, if he had found a note too much or a note short, there was still time to rectify the mistake. But, according to the intention of the parties, and the course of business, the money had ceased to be the money of the bankers, and had become that of the party presenting the cheque. . . . The bankers' clerk chose to pay the cheque; and the moment the person presenting the cheque put his hand upon the money, it became irrevocably his."

Williams, J., says, at pp. 134, 135: "I see no ground whatever for saying that the transaction was incomplete. There was no evidence that anything further remained to be done to complete it. The act of counting was no indication on the part of the plaintiff that he had not accepted the money. The argument was founded upon a mistaken view of the mode in which the question arises. Where money is paid, not in performance of a promise, at the precise day on which it ought to have been paid, but in satisfaction of a breach of promise, there must be not only payment, but acceptance in satisfaction. That, however, is not so where the payment is made in performance of an agreement on the precise day, or where the creation of the right to receive the money and the act of payment are simultaneous. In these cases, where the money finds its way into the hands of the person to whom the payment is to be made, the transaction is complete."

Byles, J., says, at p. 136: "I must confess that I should be inclined to hold, as a matter of law, that so soon as the money was laid upon the counter for the holder of the cheque to take, it became the money of the latter."

Keating, J., says, at p. 137: "The cashier counted out the money, and placed it on the counter for the purpose and with the clear intention of putting it under the control of the person who presented the cheque. This was no conditional payment—as if the cashier had said to the party, 'I hand you this money in payment of the cheque, on condition of your counting it, and assenting to its correctness.' Suppose the plaintiff had been



content to take up the money without stopping to count it, could anybody doubt that the property would have passed? It does not the less pass because the recipient chooses to count it before he puts it in his pocket."

Before applying the principles here enunciated, to the present case, I shall examine some of the other authorities cited on the argument. In Byles on Bills, 15th ed., p. 305, the law is stated to be as follows:—"Money laid down on the counter by a banker's cashier in payment of a cheque cannot be recovered back by action, though it were handed over under a misapprehension of the state of the drawer's account. . . . A banker's counter is in the nature of a neutral table, provided for the use of both banker and customer. As soon as the money is laid down by the banker upon the counter to be taken up by the receiver, the payment is complete." The cases cited in support of this are *Chambers v. Miller*, and a case of *Pollard v. The Bank of England* (1871), L.R. 6 Q.B. 623. In the latter case the circumstances were so different that it throws little, if any, light on the present case.

In Morse on Banks and Banking, 3rd ed., sec. 449, the principle is thus stated: "From the moment that the act of transfer is completed, and the minds of the parties have met and agreed upon the thing transferred as constituting a payment, instantly the right to repudiate or annul the transaction ceases. If the bank discovers at once that the drawer's account was overdrawn before the cheque was paid, it cannot recall the funds from the possession of the holder, not even if he be still at the counter, provided the act of transfer had been perfected by the intent and act of both parties, leaving nothing further to be done."

The American case of *Root v. Ross* (1857), 29 Ver. 488, decides that the fact that there is a dispute about the amount of money handed over does not make the transaction any less a complete payment. In that case the defendant's agent handed a roll of bills to the plaintiff's attorney stating that it contained sixty-three dollars. The latter counted it and found only sixty-two. It was then handed to a third party to count, who, being a sheriff, seized the money under an execution against the plaintiff. It was held to be a complete payment notwithstanding the dispute as to the amount.

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In *Thompson v. Kellogg* (1856), 23 Mo. 281, the head-note reads: "In order to constitute a transaction a payment, there must be both a delivery by the holder and an acceptance by the creditor, with the purpose on the former to part with, and of the latter to accept of, the immediate ownership of the thing passed from the one to the other." It was a suit by the plaintiff against his attorney to recover the amount of a bill on the ground that the acceptor, one De Baun, had paid the money to the attorney. The bill was presented at maturity by the defendant to De Baun, who, when payment was demanded, uncovered a large quantity of dimes and half dimes lying on a table and told the defendant that there was the money for him. Defendant went up to the table, put his hand on the money, and in running his hand over it mixed it somewhat, and said, "I suppose I shall have to take it, and I will go to my office to get bags for it": p. 282. Defendant then went out and returned in three or four minutes. During this interval, a levy had been made upon the money as the property of De Baun under a judgment against him. Defendant again demanded payment of the bill. De Baun told the defendant that there was the money; that he had once paid it to defendant. Defendant replied, "I won't receive it; it is in the hands of the sheriff." It was left to the jury to say whether or not the money had been paid to the defendant, under certain instructions from the Court which, in so far as they have any bearing on the present case, were as follows:—"1. If the jury believe from the evidence that . . . De Baun offered to the defendant the amount, . . . and the defendant received the same in immediate satisfaction of the draft; . . . the jury should find for the plaintiff. 2. If the amount of the draft was tendered to the defendant by De Baun, as aforesaid, and the same was not received by the defendant in immediate satisfaction of the draft; or if anything remained to be done by the defendant, such as counting the money before the defendant would receive the same in satisfaction of the draft, then the jury should find for the defendant. 3. A tender of the money to the defendant was not payment unless he received the same in immediate satisfaction of the draft; . . ." The jury found in favour of the defendant, and an appeal from the finding was dismissed.

In delivering the judgment of the Court, Leonard, J., said :  
 "In order to constitute the transaction a payment, there must be both a delivery by the debtor and an acceptance by the creditor, with the purpose on the part of the former to part from, and of the latter to accept of, the immediate ownership of the thing passed from the one to the other. . . . Admitting that the money was within the physical control of the creditor, the question yet remained whether it was there with intent on his part to keep it as owner, which was necessary in order to make it presently his property : or, in the words of the Court, whether he received it 'in immediate satisfaction of the draft,' or only with a view to count it over, reserving to himself, until after the examination and count were completed, the privilege of determining whether he would decline or accept the payment."

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It will be noted that the question before the Court was not whether or not what took place was sufficient to pass the property in the coin to the defendant as agent for the plaintiff, but whether or not the jury who found that the property had not passed, were properly instructed by the Court. Unless the case of the presentment of a bill of exchange for payment at maturity can be distinguished from that of a cheque presented for payment at the office of a bank, the law as laid down in this case is slightly at variance with the statements of law to be found in the judgment in *Chambers v. Miller*.

In the latter case as appears from the extracts already given, all of the four judges agree in saying that, under the circumstances, a payment is none the less complete merely because the payee has still to count the money.

Again, two at least of the judges, Williams and Byles, JJ., lay it down that no specific act of acceptance is in such a case necessary on the part of the payee, and there is nothing directly at variance with this view in either of the other judgments. What is actually decided by the case is, that where the holder of a cheque presents it to the teller of a bank for payment and the latter places the money on the counter for the former to take up, the property in the money passes from the bank to the holder of the cheque, at all events, the moment the latter places his hand on it, and that his not having yet counted it makes no difference.

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I am asked here to carry the law one step further and say that the property passes even before the holder of the cheque, or in this case, the superannuation declaration, takes the money into his physical control. While this goes beyond the actual decision in *Chambers v. Miller*, it is not, I think, contrary to it. It is, on the other hand, directly supported by the dictum already quoted of Mr. Justice Byles, and the statement in "Byles on Bills." Moreover, it is, I think, sound in principle. That, which, after all, must govern is the intention of the parties, to be gathered from their actions. Let us see then what takes place here.

Hall goes to the bank with his superannuation declaration intending to draw the sixty three dollars due to him. He presents the declaration to the paying teller, and the latter, acting for the bank, examines it, and finding it to be in proper form, decides to pay it. For this purpose he counts out sixty three dollars in bills and places them on the counter in front of Hall for him to take up. The teller has then, for the bank, done all in his power to pass the property in the bills to Hall. Hall has all along had the intention of receiving the money from the bank, since that was his very purpose in going there, and as he sees the teller count out and place on the counter certain bills, his intention evidently is to receive those very bills, subject, perhaps, to his counting them, but certainly subject to nothing else. Apart from the possibility of the amount being incorrect, or some of the bills not genuine, circumstances which it follows from *Chambers v. Miller* will not alone prevent the property in the money from passing, what conceivable reason could there be for Hall's not accepting the money he went to the bank to draw? At the moment, therefore, that the bills were placed on the bank counter, the minds of Hall and of the bank, represented by the teller, were at one. The latter intended to pass the property in those very bills to the former, and the former intended to receive them. The transaction would, therefore, appear to be complete.

I therefore hold that when the sheriff's officer seized the bills now in question, they were the property of the judgment debtor Hall.



It was argued on Hall's behalf, that his case was somewhat different from that of an ordinary customer of the bank, by reason of the bank's being the agent of the Government for the purpose of paying him the money. I do not see that this fact has any bearing on the case. The bank was paying its own money to Hall, in the expectation of being subsequently reimbursed by the Government; but even were it the very money of the Government, that was being paid out, the case would be in no respect different. Before the property in the bills passed, they were not seizable, whether they belonged to the bank or to the Government; after the property passed, they were in either case Hall's bills, and so liable to seizure under the execution.

Counsel for the bank contended that even were the payment complete, as between the bank and Hall, at the moment of the seizure, yet the former had still an interest in the money, in the nature of a lien, sufficient to entitle it to prevent its seizure. No authority was cited in support of the existence of this supposed right, and I can see no reason for holding that it does exist. It was argued, that even if the money was Hall's money when seized, the bank had still a right to have it counted; but it is plain from the language of the judges in *Chambers v. Miller*, and would seem to be clear law, apart from that decision, that the bank has no right whatever to compel the payee of a cheque to count money paid to him.

There will be judgment for the execution creditor with costs, and the claim of Hall against the bank will be dismissed with costs, payable by Hall to the bank. There will be the usual order as to the sheriff's costs.

From this judgment the plaintiff Hall and the claimant bank both appealed, and the appeals were argued together in Weekly Court at Ottawa, on the 6th of October, 1901, before FALCONBRIDGE, C.J.K.B.

*J. F. Orde*, for the bank. The bank was a mere agent for the Crown, and not a debtor to Hall; but, in either case, the bank's act was merely a tender until the money was actually accepted, since it might have been refused. A tender must be

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made so that the creditor may examine and count the money, and it does not discharge the debtor unless accepted by the creditor: Benjamin on Sales, 4th ed., 722; *Isherwood v. Whitmore* (1842), 10 M. & W. 747; (1843), 11 M. & W. 347. Counting out money to pay a debt bears no analogy to the appropriation of goods to a contract, whereby the property passes. The money does not become the creditor's until he actually receives and *accepts* it: *Re Commercial Bank of Manitoba* (1894), 10 Man. R. 61. He may not count it, but he has the right to do so; but, until he *accepts* it, the payment is not complete, and the property has not passed: *Isherwood v. Whitmore*, *supra*; *Robinson v. Peace* (1838), 7 Dowl. 93; *France v. Campbell* (1842), 6 Jur. 105. The bank was entitled to have Hall's acceptance, which it has never yet had, and the money is still the money of the bank. The Master relied on a mere dictum of Byles, J., in *Chambers v. Miller*, 13 C.B.N.S. 125, not necessary to the decision of that case. The other judges there considered acceptance necessary to complete the transaction. *Thompson v. Kellogg*, 23 Mo. 281, is opposed to *Chambers v. Miller*.

*Travers Lewis*, for the plaintiff Hall. The Master erred in holding what, at most, was only a tender to be in fact payment, and also in deciding that the intention of the parties must govern. Manual payment of cash is a question solely of fact. If intention is to be the criterion, no honest man need remain in debt. There is no magic in a bank counter to pass the possession of and property in money from the bank to the payee of a cheque, before the payee has even touched it. In the present case, no negligence is alleged or shewn. *Chambers v. Miller* merely decided that money could not be recalled by the bank, after the payee had taken and counted it. On acceptance of the pension certificate, the bank became Hall's debtor: *Warwick v. Rogers* (1843), 5 M. & G. 340. The bank was then bound to find and pay its creditor: *Toms v. Wilson* (1862), 4 B. & S. 442, per Blackburn, J., at p. 454. Payment in cash involves both physical delivery of money by the debtor, and manual receipt by the creditor: Co. Litt. 209b; *Thompson v. Kellogg*, 23 Mo. 281, at p. 285. Otherwise, conversely, if, for instance, Hall had been in the act of paying a note at the bank, and

a thief had snatched his money off the *receiving* teller's counter before the teller touched it, by parity of reasoning the note must be held to have been paid, and the bank must bear the loss. Hall had not touched the money, let alone accepted it; and it was not even well tendered, for he was entitled to demand Dominion notes, and the bulk of the money is sworn to have been in bank bills: 53 Vict. ch. 31, sec. 57 (D.). The sheriff's right to seize money is confined by R.S.O. 1897, ch. 77, sec. 18, to money belonging to the execution debtor, and he cannot intercept it *in transitu*: Chitty's Arch., 14th ed., 847; *Wood v. Wood* (1843), 4 Q.B. 397; *Robinson v. Peace*, 7 Dowl. 93; *Remsen v. Wheeler* (1887), 105 N.Y.R. 573. Resort should have been had to garnishee process: Con. Rule 911; *County of Wentworth v. Smith* (1893), 15 P.R. 372. The money was Hall's pension under R.S.C. 1886, ch. 18, as amended by 56 Vict. ch. 12 (D.); and under sec. 12 he is liable to serve the Crown again. Such pensions are not attachable or exigible under execution: *Apthorpe v. Apthorpe* (1887), L.R. 12 P.D. 192, *per* Cotton, L.J.; *The Queen v. McFarlane* (1882), 7 S.C.R. 216.

*R. V. Sinclair*, for Hatch, the execution creditor, relied on the reasoning of the judgment in appeal, and cited *Root v. Ross*, 29 Ver. 488; *Stewart v. Jones* (1900), 19 P.R. 227; and *Chambers v. Miller*; *supra*.

December 9. FALCONBRIDGE, C.J.—I have consulted the authorities referred to in the extremely careful and elaborate judgment of the learned Master at Ottawa, and I have likewise perused and considered the additional citations and references on the argument before me.

I see no reason to differ from the result of the Master's judgment, nor to add anything to what he has written on the subject.

Appeal dismissed with costs.

G. A. B.

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## [DIVISIONAL COURT.]

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WALSH V. WALPER.

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Dec. 26.

*Execution—Fieri Facias—Goods—Liquor License—Covenant to assign License—Covenant Running with the Land—Interpleader—R.S.O. 1897, ch. 245, sec. 37.*

A license under the Liquor License Act cannot be seized by a sheriff under a *feri facias* against goods. The piece of paper upon which it is printed and written ceases to be seizable as an ordinary chattel when it is converted into a license.

The right to sell liquor at a particular place under such a license is a personal one and is not assignable by the holder of it except under the conditions imposed by sec. 37 of the Liquor License Act, R.S.O. 1897, ch. 245.

*Semble*, a covenant in the lease of an hotel by the lessee that he will from time to time apply for a license and at the expiration of the lease assign to the lessor the license, if any, then held by him, is not a covenant binding on the assignee of the term as such, being merely personal and having nothing to do with the land or its tenure.

THIS was an appeal by the claimant, William Gordon, from an order of the judge of the county court of Perth dismissing with costs a claim made by him to the goods seized under execution in the action of *Walsh v. Walper*.

The facts were as follows; In 1898 the claimant leased the Albion Hotel in Stratford to one Jung for a term of ten years: the lease contained a covenant by the lessee that he would from time to time apply for a license under the Liquor License Act, and that at the termination of the lease, either by effluxion of time or otherwise, he would hold the license then in existence as trustee for the lessor, and assign it to him or his nominee.

On December 16th, 1898, Jung assigned the lease to Kress, and on October 3rd, 1899, Kress assigned it to Walper, the execution debtor, by an instrument to which Gordon, the lessor, was a party for the purpose of assenting to the assignment. In and by this assignment Walper covenanted with Gordon to perform all the covenants on the part of the lessee contained in the lease. On October 3rd, 1899, Walper made a chattel mortgage to Randall of certain chattels then in the hotel and of others to be brought therein, and therein specially indicated. Walper obtained a license under the Liquor License Act for six months from May 1st, 1900. On July 17th, 1900, the sheriff of Perth, under a *fi. fa.* in the action of *Walsh v. Walper*, seized the license itself. On July 18th, 1900, Walper executed a



transfer of the license to Gordon, and on July 25th, 1900, Randall, the holder of the chattel mortgage, sold to Gordon *inter alia*, under the chattel mortgage, the license. On July 19th, 1900, Gordon gave the sheriff notice that he claimed the license under the terms of the lease to Jung, under which Walper, as assignee, agreed to hold it as trustee for him; and on July 25th, 1900, he served a further notice claiming it under his purchase from Randall.

The execution creditor then notified the sheriff that he disputed Gordon's claim, and the sheriff took out an interpleader summons. When the parties appeared before the Judge of the county court upon this summons, it was agreed between them that he should hear the matter upon the affidavits and admissions under Rules 1110 and 1111 subject to the right of appeal, and the matter stood over for argument. In the meantime the claimant had obtained from the license inspector, as assignee of the license, provisional leave to carry on business at the Albion Hotel bar for one month; but, being unable to obtain the license from the sheriff, and being liable to a penalty for carrying on the business without having the license hung up in the bar, he applied for and obtained an order from the Judge giving him possession of the license upon his paying \$75 to the sheriff. Ultimately, on September 6th, 1900, the transfer of the license from Walper to the claimant was confirmed by the license commissioners, and the license, which was the subject of the present litigation, was given up to the commissioners when a new license at its expiration was issued. The interpleader summons in the meantime was pending before the county Judge, and finally came on for argument before him on January 15th, 1901, at which time it was well known to both parties that the license in question had expired and was worthless, and that nothing but the costs were then in question. The learned Judge held that the onus of proof was on the claimant, as the license was in the possession of the judgment debtor when seized. The claimant then claimed title to it: 1st. Under the chattel mortgage. 2nd. Under the lease from himself to Jung. It was conceded in the argument that Walper was the assignee of the term, but the assignment itself containing the covenant of Walper with Gordon was not then produced or put in. Nor

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was the assignment of the license from Walper to the claimant made on the day after the service put in or referred to.

The learned Judge held, upon the affidavits and documents before him : 1. That the license was not covered by the chattel mortgage, and therefore did not pass to the claimant. 2nd. That the license, and the covenants in the lease with regard to it, were mere personal matters, and that the liability under the covenants in the lease with regard to it did not pass with the term ; and that even if they did, the covenant to transfer the license was contrary to the License Act, which makes a transfer void unless certain events should happen, of the happening of which there was no evidence before him ; and he dismissed the claim and ordered the claimant to pay the costs of the sheriff and the execution creditor.

Upon the settlement of the order, the solicitor of the claimant desired to give in evidence the assignment of the term from Kress to Walper containing the contract between the claimant and Walper, and also the assignment dated July 18th, 1900, from Walper to the claimant of the license. The learned Judge refused to re-open the matter, but received from the solicitor his affidavit, with the two documents as exhibits, and they were produced with the other papers to the Divisional Court.

The claimant appealed to the Divisional Court from the order dismissing the claim, as well as from that refusing to admit the further evidence, and also asked for an order as to the disposal of the \$75 paid to the sheriff by the claimant.

The appeal was argued before the Divisional Court, consisting of FALCONBRIDGE. C.J.K.B., and STREET, J., on March 5th, 1901.

*J. Idington*, K.C., for the claimant, contended that the sheriff had no right to seize the license, because the covenants in the lease gave the claimant an interest in it, both as a property in itself, and as incidental to property in the leased premises, in order that the place should be conducted as an hotel, according to the covenants in the lease : *Werderman v. Société Générale D'Électricité* (1881), 19 Ch. D. 246.; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523 ; *Bryce Bros. v.*

*Kinnee* (1892), 14 P.R. 509; *Holroyd v. Marshall* (1862), 10 H.L. 191; *Reeves v. Barlow* (1884), 12 Q.B.D. 436; *Lazarus v. Andrade* (1880), 5 C.P.D. 318; *Langton v. Horton* (1842), 1 Ha. 549; *Kerakoose v. Brooks* (1860), 14 Mo. P.C. 452; *Bloomer v. Union Coal and Iron Co.* (1873), L.R. 16 Eq. 383; *Greet v. Citizens Insurance Co.* (1879), 27 Gr. 121; and also because such a license is not exigible: *The Queen v. Potter* (1860), 10 C.P. 39; *Reg. v. Watts* (1854), Dears. 326; *S.C.*, 6 Cox C.C. 304; *Reg. v. Reed* (1854), 2 C.L.R. 607, at p. 609; *Reg. v. Powell* (1852), 2 Den. 403; Bouvier's Law Dict., *sub voce* "Execution," that the covenant as to assigning the license ran with the land, and the license was subject to the claimant's direction as to whom it should be transferred to: *Fleetwood v. Hull* (1889), 23 Q.B.D. 35; and that if the right to the license was not in the claimant it was in the mortgagee.

*W. H. Blake*, for the execution creditor, objected that as the facts in this case were in dispute, Rule 1111 did not apply, and the duty of the Judge was to make an interpleader order and direct an issue; that therefore this appeal was also irregular: *Re Justin* (1898), 18 P.R. 125; that the license was a personal one, and no rights or liabilities in respect to it under the covenants in the lease passed to the assignees of the term; that *Fleetwood v. Hull* was authority for this; and that as to the bill of sale by Randall, it was after the seizure, when the rights of the parties had become ascertained: *Usher v. Martin* (1889), 24 Q.B.D. 272; *Richards v. Jenkins* (1887), 18 Q.B.D. 451.

*Idington*, in reply, referred to Rule 1110, and also to sec. 52 of the County Courts Act, R.S.O. 1897 ch. 55. He also referred to sec. 37 of the Liquor License Act, R.S.O. 1897 ch. 245, as to the transfer of licenses.

The notice of appeal was not directed to the sheriff, and he was not made a party to it, although he had appeared before the county Judge by the same counsel as the claimant.

December 26. The judgment of the Court was delivered by STREET, J. [after stating the facts as above];—When this matter came on for hearing and argument before the learned Judge of the county court both sides well knew that the original subject matter had disappeared, and that the further prosecution of

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their contest was useful only for the purpose of determining, at further expense, which of them should pay the moderate amount of costs already incurred.

As the Courts have frequently pointed out, it became the duty of the parties under such circumstances to make an effort, at all events, to have the question of the existing costs disposed of in a summary manner by consent before adding to them by fighting over the open grave of a dead issue.

This course, however, does not appear to have suggested itself to either party in the present case. The passing away of the cause of action was only the signal for the beginning of a new round, and the contest has been fought to a finish with a vigour worthy of a better cause. In my opinion the litigation never had a solid foundation, because the license was not a thing which could be seized by the sheriff under a writ of *fi. fa.* The piece of paper upon which it was printed and written ceased to be seizable as an ordinary chattel when it was converted into a license under the Liquor License Act, and could only, therefore, be seized, if at all, as a license, for it became a license and ceased to be a mere piece of paper.

The general rule at common law was that only those things could be seized under a *fi. fa.* which could be made the subject of a sale at common law: *Wood v. Wood* (1843), 4 Q.B. 397. A right to sell liquor at a particular place clearly was not a right which could be seized or sold under the strict limitations of the common law upon the powers of the sheriff, and there is nothing in the statutes enlarging them which can be construed as extending to such a right.

The right itself is a personal one and is not assignable by the holder of it except he obtain the consent, and comply with the conditions prescribed by sec. 37 of the Liquor License Act, R.S.O. 1897, ch. 245.

The sheriff, however, went through the form of seizing it, and the claimant treated the seizure as valid and claimed the license as against the execution creditor, not as being property which was never subject to seizure, but as being his property under the covenants of the original lessee Jung and, later on, as having passed to him under the chattel mortgage. He never produced before the Judge the assignment to him from the



debtor of the license, made on the day after the seizure, nor the contract between himself and the debtor Walper contained in the assignment to the debtor of the lease, until the other grounds upon which he claimed had been determined against him by the learned Judge.

In my opinion the learned Judge was right in holding that the license did not pass to Randall under the chattel mortgage, and, therefore, did not pass to the claimant under the bill of sale of July 25th, 1900, from Randall to him. It is not mentioned specifically in the chattel mortgage, and not being an instrument of a character which could be conveyed to the mortgagee without its becoming void under the Liquor License Act, it cannot have been intended to be comprised under mere general words. The learned Judge also rightly held, in my opinion, that the covenant of the original lessee that at the expiration of the lease he would assign to the lessor the license if any then held by him, was not a covenant binding upon an assignee of the term as such, but that it was a mere personal covenant, having nothing to do with the land or its tenure. In the present case, however, it clearly became binding upon the tenant Walper under the terms of his covenant with the claimant contained in the assignment of October 3rd, 1899, from Kress to Walper, which, unfortunately, was not before the learned Judge until after his order had been pronounced, though before it was formally issued.

In pursuance of his covenant Walper did assign to the claimant this license on the day after the sheriff had seized, and the transfer under the Act became valid, because within a month it was confirmed by the License Commissioners, but, again, that fact was not, any more than the fact of a transfer *de facto*, in evidence before the learned Judge, as he expressly tells us in his judgment.

The position of the claimant appears to be this: that having in his hands direct proofs of the assignment to him of the license and of his right to an assignment of it from the judgment debtor, he rested his case, without producing these proofs, upon other grounds which failed, and then he endeavoured to obtain a further hearing for the purpose of producing them. Had they been produced at the proper time before the learned

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Judge below the question would then have been necessarily raised as to whether the license was seizable under the *fi. fa.* As it is the whole matter miscarried by reason of the non-production of the two assignments. Counsel for the claimant explains their non production by stating that their existence was well known to both sides. This, however, is not admitted by the other side, and the learned Judge states his ignorance of these facts. The papers filed lead to the conclusion that the matter was one in which the parties were at arm's length.

In my opinion the further facts now given in evidence should be admitted; the argument before us was directed on both sides to them as well as to those before the learned Judge, and having admitted them the claimant shews a right to claim the license. As it was not in my opinion seizable under the *fi. fa.* at all, the result seems to be that the claimant was entitled to it as against the judgment creditors, and the judgment should be varied by so declaring. But under the circumstances I think there should be no costs of the proceedings before the learned Judge to either the claimant or the execution creditor, nor should there be any of the present appeal, and the order below will be varied in that respect also. The sheriff is entitled to his costs of the interpleader proceedings under the order appealed from, and as no one has appealed from the order giving him costs it should not be varied so far as he is concerned; but instead of directing the claimant to pay his costs the order will be that he be entitled to deduct the amount of his costs when taxed from the \$75 in his hands, paying the balance to the claimant, and that the execution creditor repay to the claimant one half of the costs of the sheriff. The sheriff is not entitled to any fees or poundage upon the seizure.

The execution creditors as well as the claimant should have notice of taxation of the sheriff's costs.

A. H. F. L.

## [DIVISIONAL COURT.]

TRUSTEES METHODIST CHURCH, CARLETON PLACE AND  
YOUNG V. KEYES.

D. C.

1902

Jan. 2.

*Church—Methodist Church—Power of Trustees—Allotment of Free Seats—Power to Rent Pews—47 Vict. ch. 88 (O.)—47 Vict. ch. 146 (D.)*

Under the trusts set out in the schedules to the above Acts the trustees of the Methodist Church have no power to allot free seats to particular members of a congregation. They have, however, the power to rent pews at a reasonable rent.

THIS was an appeal by the defendant from the judgment of the Judge of the county court of the county of Lanark declaring the plaintiff Young entitled to the use of pew No. 64 in the Methodist Church at Carleton Place, as against the defendant, and assessing the plaintiffs' damages at \$1, and ordering the defendant to pay the costs.

The church in question is vested in the trustees, who are plaintiffs, under 47 Vict. ch. 88 (O.), and 47 Vict. ch. 106 (D.), upon the trusts set forth in schedules to each of those Acts. The trustees have never rented any of the pews in the church, but have been in the habit of allotting them, through a committee of their body, to the different members of the congregation. The plaintiff Young and the defendant Keyes each claimed to have had pew No. 64 allotted to him. The defendant Keyes was notified by the minister in charge that another pew had been allotted to him, but he refused to accept it, and insisted upon his right to occupy pew No. 64, although he was informed that it had been allotted to the plaintiff Young. He, also, disputed the legality of the meetings of the trustees at which the allotment of the pew to the plaintiff Young had been made.

The learned Judge tried the action without a jury and entered judgment for the plaintiffs with \$1 damages and the costs of the action.

The defendant appealed to the Divisional Court, and the appeal was argued on December 12th, 1901, before FALCONBRIDGE, C.J.K.B., and STREET, J.

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*J. J. Maclaren*, K.C., for the defendant, referred to the Act respecting the Union of Methodist Churches, 47 Vict. ch. 106 (D.), schedule B (47 Vict. ch. 88 (O.), schedule A), clauses 7, 21, 22, and contended that no sufficient notice had been given of the meeting to the trustees, and that there was no proper quorum present when they acted; that the maxim *Omnia præsumuntur rite esse acta* did not apply to a case of expulsion such as this; and that the trustees could not give one man a right over another in respect to a free pew.

*J. A. Allan*, for the plaintiff, contended that the defendant was estopped from denying the trustees' right to allot pews, as he rested his title on allotment by them; that the trustees had a right to allot pews: *Oliphant's Law of Pews*, p. 15; *Billings' Law of Pews*, p. 12; that clause 22 of the schedule was not intended to limit powers which the trustees would have, but to extend them; that certainly no pew was rented to the defendant, and the defendant could not claim as against the trustees who were owners of the property; that the Court would not control the discretion of the trustees: *Asher v. Calcrafft* (1887), 18 Q.B.D. 607; *Reynolds v. Monkton* (1841), 2 Moo. & R. 384; that the congregation had adopted the practice of allotting pews with the consent of the trustees and of the pew board, and that the defendant was a member of the congregation and of the pew board and of the trustee board; and that as owners of the fee the trustees were entitled to regulate the property, and were responsible for decorum in the church. He also referred to *Vicar of St. Saviour, Westgate-on-Sea v. Parishioners of Same*, [1898] P. 217, at p. 221.

*Maclaren*, in reply, contended that there was no right to eject the defendant without any notice after three years' possession without the consent of the trustees, even if such ejectment was otherwise valid.

January 2. The judgment of the Court was delivered by STREET, J.:—The legal estate in the land is vested in the trustees (who are joined as plaintiffs here) "for the benefit of the Methodist Church upon the trusts set out in the schedule to the Act:" 47 Vict. ch. 88, sec. 3 (O.). Under paragraph 2 of the schedule one of their trusts is from time to time, and at all



times, to permit the church "to be used, occupied, and enjoyed as and for a place of religious worship by a congregation of the Methodist Church, and for public and other meetings and services of a religious or spiritual character, according to the rules, discipline and general usages of the said Church." Under this trust they are bound to permit the use of the church to the members of the congregation for the purpose of religious worship at the times appointed for the services.

Lest, however, there should be a doubt raised under paragraph 2 as to their right to set apart any portions of the church for the use of particular members of the congregation by renting pews to them, the 7th paragraph declares one of their further trusts to be "to let the pews and seats in the said church . . . at a reasonable rent or reasonable rents, reserving as many free seats where and as may be thought necessary or expedient."

The trustees have never rented any of the pews in this particular church, but they have assumed that they had power to allot particular seats to particular members of the congregation, although all the seats in the church were what are called free seats.

Upon the best consideration I have been able to give to the construction of the provisions of this trust deed, I am of opinion that the trustees under it have no power to allot special pews or seats to particular members of the congregation unless they rent them for a money consideration. Unless this is done, then all the seats in the church are free seats, and any vacant seat may be occupied by any member of the congregation under the trusts of paragraph 2. Persons may, of course, be appointed by the trustees to regulate during the services the seating of the congregation, and to prevent disorder and overcrowding: see *Asher v. Calcrafft*, 18 Q.B.D. 607; any person wilfully creating disorder during the service may be punished under the 173rd section of the Criminal Code, 55-56 Vict. ch. 29 (D.)

Any person renting a pew from the trustees under the 7th paragraph of the deed would, of course, be entitled to protection from the Courts against any interference by them, for he would then have rights as a licensee conferred in direct conformity with the trusts upon which the property is held

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Both parties—that is, Young the plaintiff, and the defendant—have claimed special rights in this pew: the plaintiff claims exclusive rights, the defendant claims a right to squeeze himself and his family into it without reference to those whom he may find already seated there. The squabble is not a creditable one to either of them, but it seems to have been aggravated by the uncompromising position taken by the defendant.

I do not at all dispute the correctness of the view taken by the Courts in *Asher v. Calcraft*, 18 Q.B.D. 607, and *Reynolds v. Monkton*, 2 Moo. & R. 384, as to the general power of the officers of any place of public worship to distribute the members of the congregation in a particular manner at any particular service for the purpose of preventing disorder during the service. That, however, is not at all the right that is claimed here.

In my opinion the judgment entered for the plaintiffs should be set aside, and judgment entered dismissing the action, but without costs, and the appeal should be allowed with costs.

A. H. F. L.

## [DIVISIONAL COURT.]

IN RE TOWNSHIP OF NOTTAWASAGA  
AND  
THE COUNTY OF SIMCOE.

D. C.

1901

Dec. 20.

*Assessment and Taxes—Equalization of Assessments—Appeal to the County Judge—Limitation of Time within which Judgment is to be Delivered—Directory Enactment—R.S.O. 1897, ch. 224, sec. 88, sub-secs. 1, 7.*

There is nothing in R.S.O. 1897, ch. 224, sec. 88, sub-sec. 1, which gives a township municipality, dissatisfied with the county council's equalization of assessments, the right to appeal to the county Judge, or otherwise as in that section mentioned, necessitating a by-law to authorize such an appeal. A resolution is sufficient.

The provision in sub-sec. 7 of sec. 88, that the judgment of the county Judge on such an appeal shall not be deferred beyond August 1st next after such appeal, is directory and not imperative, and is to be construed as only directing the Judge to proceed with all reasonable and possible expedition to determine the matter.

THIS was a motion on behalf of the corporation of the county of Simcoe by way of appeal from a judgment of Boyd, C., refusing a prohibition to His Honour Judge Ardagh, the county Judge of the county of Simcoe against his further proceeding to hear or determine an appeal pending before him by the corporation of the township of Nottawasaga against the equalization by the county council of the assessment rolls for the year 1900 of the various municipal bodies in the county. The facts were as follows:—The equalization by the county council of the various assessment rolls for the year 1900 was made in due course at their June session in 1901 under sec. 87 of the Assessment Act, R.S.O. 1897, ch. 224, and at the same session they determined that they were willing in case of appeal to have the final equalization made by the county Judge of the said county, in accordance with sub-sec. 2 of sec. 88.

The township council of Nottawasaga met on June 25th, 1901, specially to consider the equalization made by the county council, and in a resolution setting forth that the township had been unfairly dealt with in the equalization resolved "that this council do appeal against the equalized assessment of the county for the year 1901, and that the clerk be instructed to notify the county clerk accordingly, and further that this council is willing to have the final equalization of the county made by the county Judge."

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Notice of appeal in writing in pursuance of this resolution was given on June 28th, 1901, by the township clerk to the county clerk who forwarded it to the county Judge under sub-sec. 7 of sec. 88, and the county Judge appointed July 11th, 1901, to hear the appeal. Upon that day the counsel present for the county council objected that no by-law had been passed by the township council authorizing the appeal, and that the appeal was, therefore, unauthorized. This objection was overruled by the Judge, and he proceeded with the taking of the evidence offered on behalf of the township *de die in diem*, or nearly so, for thirty days, at the end of which time, that is to say, on the 17th of September, the evidence on behalf of the township was still proceeding. On August 1st the counsel for the county objected that the time allowed by law for the hearing of the appeal under sub-sec. 7 of sec. 88 had now expired and that he had no authority to proceed after that day. This objection was overruled and the taking of evidence was continued, as already stated, until September 17th, 1901, when negotiations took place between the parties. These were found to be abortive on October 14th, 1901, and the corporation of the county then instituted the present proceedings to prohibit the county Judge from further proceeding in the matter of the appeal.

In the meantime, on August 5th, 1901, the clerk of the county council certified to the clerk of each municipality in the county the amount directed to be levied therein for county purposes for the current year as apportioned by the county council in June, 1901. This apportionment was made by the county council upon the rolls for the year 1900, being the rolls equalized by them in June, 1901. In certifying thus the clerk of the county council treated the appeal of the township of Nottawasaga as having become abortive.

It appeared from the affidavit of the county clerk that the practice of the county council for many years back had been to apportion the rate for each year upon the rolls for the preceding year and not upon the rolls which had been equalized in the preceding year.

A by-law of the council of the township of Nottawasaga was filed upon the motion passed on August 12th, 1901, authoriz-



ing the reeve to employ a solicitor to conduct the appeal of the township against the county equalized assessment for the year 1901.

The motion for prohibition was argued before the Chancellor sitting in Chambers on November 4th, 1901, and on November 18th, 1901, after a re-argument, he dismissed the motion with costs.\*

The corporation of the county then appealed to the Divisional Court and their appeal was argued before FALCONBRIDGE, C.J.K.B. and STREET, J., on December 9th, 1901.

\*The judgment of Boyd, C., delivered on November 7th, 1901, after the first argument, was as follows:—

BOYD, C.:—Both counsel assumed on the argument that the rolls as equalized after appeal to the Judge were to be used as the basis of apportionment and liability for county rates for the same year, and in that connection R.S.O. 1897, ch. 224, sec. 94, was referred to as shewing that the county clerk was to certify the amount of the apportioned county rate to the clerks of each local municipality before the 15th of August. Hence, it was argued, the necessity of the appeal being disposed of within the statutory limit, the 1st of August: sec. 88.

This position, taken by the applicant and not disputed by the respondent, does not seem to be well founded. The true view is pointed out and decided by Harrison, C.J., in *In re Revell and the County of Oxford* (1877), 42 U.C.R. 337, at p. 345: "While it is the duty of the council of the current year to equalize the assessment rolls of the current year, it is equally their duty, when apportioning a county rate, to make the equalized and revised rolls of the preceding year the basis of the apportionment. In other words, while it is the duty of the county council, for the purpose of county rates, to equalize the rolls of the current year, that equalization is for use, not in the current, but in the next succeeding year." Hence the rolls of the year now under the consideration of the county judge on the equalization appeal are not, as and upon the result of the appeal, to be used for the present year, but are, as finally equalized by him, to be the basis of apportionment for the next year.

If this is the correct situation, all the argument *ab inconvenienti* urged by the applicant disappears, and the better view, according to numerous authorities I have consulted, is in favour of the "directory" construction of the Act.

On the footing on which this case was argued before me, I had written a judgment taking the view that the direction was imperative and mandatory; but I withhold it that the parties may take account of this new aspect of the application, which subsequently occurred to me.

If nothing is to be urged against the pertinence of *In re Revell* to the present statute, my judgment will be as indicated, dismissing the application without costs.

If further argument is desired on this point I will hear it the next day I take Chambers.

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*A. E. H. Creswick*, and *C. E. Hewson*, for the corporation of the county of Simcoe, contended that the law had been changed since *In re Revell and the County of Oxford*, 42 U.C.R. 337; that under the present Assessment Act, R.S.O. (1897) ch. 224, sec. 91, you still strike the rate on the last year's rolls, but the equalization takes place during the current year for the current year's rates; that the time limit in sec. 88, sub-sec. 7, is imperative and not merely directory: *Town of Trenton v. Dyer* (1894), 21 A.R. 379; *Corporation of County of Lincoln v. Corporation of Town of Niagara* (1866), 25 U.C.R. 578; *King v. Justices of Leicester* (1827), 7 B. & Cr. 6 at p. 13; *Thackery v. Township of Raleigh* (1898), 25 A.R. 226; *Regina v. French* (1887), 13 O.R. 80; *In re Roland v. Village of Brussels* (1882), 9 P.R. 232; Maxwell on Statutes, 2nd ed. pp. 44, 45, 230, 452; R.S.O. 1897, ch. 1, sec. 8, sub-sec. 19; that the rolls had to be finally revised before July 1st in each year; that there had been no by-law authorizing the appeal in this case to the county Judge. They also referred to *In re Brazill v. Johns* (1893), 24 O.R. 209; *Robertson v. Cornwell* (1878), 7 P.R. 297; *Holt v. The Corporation of the Township of Medonte* (1892), 22 O.R. 302.

*Haughton Lennox*, for the corporation of the township of Nottawasaga, contended that the limitation of time for delivering judgment by the county Judge in sec. 88, sub-sec. 7, merely imposed a duty upon the latter to try to dispose of the appeal at that time: *Nickle v. Douglas* (1874), 35 U.C.R. 126; *Regina v. Buchanan* (1898), 12 M.R. 190; *Re McFarlane v. Miller* (1895), 26 O.R. 516, at pp. 518-9; *Re Farlinger v. Village of Morrisburg* (1889), 16 O.R. 722; *The Queen v. Mayor of Rochester* (1857), 7 E. & B. 910, at p. 916; *In re Smith and The Corporation of the Township of Plympton* (1886), 12 O.R. 20; *Maison-neuve v. Township of Roxborough* (1899), 30 O.R. 127; that the appeal involved no stay of proceedings and that there was nothing to prevent the municipal machinery from going on; that *In re Revell* in the main applied still, and that under R.S.O. 1897 ch. 224, sec. 91, all the county council had to do was to apportion the money among the municipalities as they stood on the roll the year before; and that there was no necessity for a by-law of the township before the appeal: *The*

*Corporation of the Township of Pembroke v. Canada Central R.W. Co.* (1882), 3 O.R. 503. He also referred to *Re Jones v. Julian* (1897), 28 O.R. 601; *Jones v. James* (1850), 19 L.J.Q.B. 257; *Re Guy and the Grand Trunk R.W. Co.* (1884), 10 P.R. 372, at p. 375; Lloyd on Prohibition, 1st ed., p. 14.

December 20. The judgment of the Court was delivered by STREET, J. [after stating the facts as above]:—In my opinion the judgment appealed from dismissing the motion should be affirmed.

Two objections were urged against the authority of the Judge of the county court to proceed with the hearing of the appeal, the first being that because of the absence of any by-law of the township council of Nottawasaga authorizing the appeal from the county council's equalization it had never been properly launched; and the second being that after August 1st the authority of the county Judge to hear it came to an end under the 7th sub-sec. of sec. 88 of the Assessment Act.

I think the first objection fails upon the ground that there is nothing in the provision giving them the right to appeal from the equalization (sub-sec. 1 of sec. 88), which requires the passing of a by-law; it is one of the matters in regard to which the determination of the council may be signified by a resolution: *Port Arthur High School Board v. Town of Fort William* (1898) 25 A.R. 522, 527.

In my opinion the second objection must likewise fail. It raises the question whether the provision at the end of sub-sec. 7 of sec. 88 is imperative or merely directory, and I see no reason for holding it to be otherwise than directory. The subsection in question provides that the county Judge shall fix a day for hearing the appeal and proceed to *hear and determine* the matter of appeal and may adjourn the hearing from time to time, but "the judgment shall not be deferred beyond the 1st day of August next after such appeal." It is evident from sub-sec. 4 of the same section that the taking of the evidence of witnesses is contemplated by the Act. The matter stands thus: A right of appeal is given to this township; the county Judge is authorized to hear evidence upon the appeal and he is to hear and determine the appeal; the 1st of August arrives and only

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part of the evidence has been heard. Did the Act intend that the appeal should then drop and the proceedings become futile? It cannot have been intended, of course, that the Judge should proceed to determine the appeal upon the evidence of one side only. If the contention of the county is right the power of the Judge ended on the 1st of August, even although the whole evidence were closed on that day and nothing remained but the delivery of judgment. On the other hand if the statute is to be construed as merely directory the judge had power to complete the evidence and deliver judgment at any time after the 1st of August, that date being mentioned as directing him to proceed with all reasonable and possible expedition to determine the matter. Of the two views I am of opinion that the latter one must be taken to be the only proper construction to be given to the clause, for in the absence of positive language it cannot have been intended to give an appeal by one sub-section and to render it nugatory by another; nor is it possible to reconcile the duty cast upon the Judge to hear and determine the matter with a positive direction that whether it has been possible or not to hear it fully it must be determined not later than the 1st of August: *Regina v. Mayor, etc., of Rochester*, 7 El. & Bl. 923; *Nickle v. Douglas*, 35 U.C.R. 126, at 140; *Re Ronald v. Brussels*, 9 P.R. 232.

It was urged as a reason for holding time to be of the essence of the direction in the statute that the result of a delay after the date fixed for determining the appeal would throw the whole machinery for the collection of the taxes through the county out of gear and might leave the municipalities for an indefinite time without their usual supplies of money. The argument is a powerful one, and what is presented for decision resolves itself in fact into a choice between two evils. What is the intention of the Legislature in the matter as revealed by the Municipal Act? I think that their intention was that the county rate should not be struck until appeals against the equalization had been determined, and that they did not foresee the possibility of an appeal being prolonged to an extent to interfere with the machinery provided for the collection of rates. This means that the county Judge must go on with the



appeal and determine it with all possible expedition and that there can be no prohibition.

The case of *In re Revell*, 42 U.C.R. 337, is referred to in the judgment appealed from, and was much referred to in the argument before us as having a bearing upon the case. It appears to me, however, that that case is of no help whatever towards solving the real difficulty in the present one. All that was determined in that case was that the county rate for the year 1877 was improperly struck upon the assessment rolls of that year instead of upon those for the preceding year, 1876. The only alteration in the sections upon which it was founded down to the present time is a merely verbal one apparently made to clear up an ambiguity with which the Court in that case was troubled. As the corresponding sections 87 and 91 now stand their meaning is plain. The county council in the year 1900, for example, takes the assessment rolls for the year 1899 and equalizes them (sec. 87), and then, in apportioning the county rate, it takes those rolls of the preceding year, 1899, which have been equalized for that year and strikes the county rate for 1900 upon them (sec. 91),

In my opinion the present appeal should be dismissed with costs.

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## [IN THE COURT OF APPEAL.]

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Dec. 31.

REX V. CLARK.

*Criminal Law—Theft—Evidence—Answers Tending to Criminate—Claim of Privilege.*

The prisoner, being the manager of a branch store for the sale of goods supplied by the factory of his employers, arranged with the checker at the factory to load certain goods on a waggon going to his branch store without charging them or keeping the usual check on them which his employers' system required, and had the goods delivered to a customer of his branch, the prisoner stating that for certain business reasons beneficial to his employers he had merely postponed the charging of the goods:—

*Held*, that if the judge did not accept the prisoner's explanation, which he was not bound to do, there was evidence upon which he could legally find him guilty of theft as defined by the Criminal Code.

If a witness when called upon to testify does not object to do so upon the ground that his answers may tend to criminate him, they are receivable against him (except in the case provided for by sec. 5 of the Canada Evidence Act, 1893, as amended) in any criminal proceeding against him thereafter, but if he does object he is protected.

Judgment of the county Judge of the county of Wentworth affirmed.

THIS was a case reserved by the county Judge of the county of Wentworth.

It appeared that the prisoner was employed by Messrs. Lawry & Co., who had several branch stores for the sale of provisions, etc., in the city of Hamilton, which were supplied with goods from a factory or supply station, and that the prisoner was the manager of the branch known as The Market branch.

The system adopted was that orders for the goods required were sent by the different managers of the branches to the factory, and the goods were then sent on waggons to the branches. Slips were prepared by one Lambert, a clerk in the factory, shewing the goods sent, which slips were afterwards checked over by one Keefer, a checker also at the factory, and forwarded by the drivers to the branches.

On the 19th August, 1901, the prisoner instructed the driver going from his branch with an order, to get four tubs of butter and two cheeses from Keefer and to deliver them to a customer of The Market branch, named Holt, the prisoner having previously arranged with Keefer that these goods although loaded upon the waggon, should not be put upon the

slip, or, as he subsequently alleged, charged against The Market branch until after the first day of the following month.

When the driver told Keefer that the prisoner had sent him for the goods, Keefer put them upon the waggon himself in the absence of Lambert, who was occupied in another part of the factory, and sent them away without entering them on the slip in the ordinary course.

The goods were delivered by the driver to Holt.

The prisoner elected to be and was tried before the county Judge of the county of Wentworth without a jury, and was found guilty of "stealing the four tubs of lard and two cheese" (sic), and sentenced to four months' imprisonment.

An application was made to the Judge on behalf of the prisoner to reserve a case, which he refused to do, but on an appeal being subsequently made to the Court of Appeal, he was directed to state a case.

The case was argued on December 23, 1901, before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A.

The question as stated was :

"Was there any evidence on which, as a matter of law, the said Judge could legally find the said Arthur Clark guilty of theft as defined by the Criminal Code."

The defence set up by the prisoner at the trial was that Holt was a customer of The Market branch, and had become dissatisfied with his treatment by Lawry & Co., and in the interest of the latter as his employers he desired to retain his custom as well as increase his own business at The Market branch, and that he hoped to do so by giving him longer credit, which by his scheme he could do until after the beginning of the following month, when he intended charging him with the lard and cheese, and having them charged at the factory against the Market branch.

*J. V. Teetzel*, K.C., for the prisoner. There was no evidence upon which the prisoner could be convicted of theft. He may have been guilty of an infraction of his employer's regulations,

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but not more, and his object was plainly to give this customer a longer credit than others and so retain his custom for the benefit of his employers. The evidence he gave on the trial of Keefer should not have been received. While he did not object to answer and claim protection, it is submitted it is not necessary that he should do so. Sec. 5 of the Evidence Act, as amended, expressly gives protection where objection is made, but it is contended that the amending Act does not make objection to answer a condition precedent to his protection, and that under *The Queen v. Hammond* (1898), 1 Can. C.C. 373, the evidence is not admissible, notwithstanding no formal objection was taken. The Legislature has not said that the evidence *shall be admissible* if no objection is taken, and the section being one affecting the liberty of the subject, must be construed strictly.

*John R. Cartwright*, K.C., Deputy Attorney-General, and *John Crerar*, K.C., for the Crown. Clark had been previously suspected and specially warned to keep the rules of his employers. The Judge's conviction should not be interfered with. It is his province to believe some witnesses and disbelieve others, and he has not believed those called for the prisoner: *The Queen v. Harris* (1898), 2 Can. C.C. 75. The explanation given by the accused is not deserving of credence. We also refer to the definition of "theft:" sec. 305 of the Code, clause (a), and to *Rex v. Morfit* (1815), R. & R. 307. The prisoner's evidence on the other trial was properly admitted. *The Queen v. Hammond* is opposed to *Regina v. Williams* (1897), 28 O.R. 583, and should not be followed, but the amendment made to sec. 5 of the Canada Evidence Act of 1893, 56 Vict. ch. 31 (D.), by 61 Vict. ch. 53 (D.), removes all doubt as to the point in question.

*Teetzel*, in reply.

December 31. ARMOUR, C.J.O.:—I have only to say that the evidence certified and returned to us by the learned Judge shews plainly and beyond any reasonable doubt that the prisoner was guilty of the offence charged, and was properly convicted of it.



OSLER, J.A. :—Upon the whole I have come to the conclusion that we cannot interfere in this case, and that the question which has been submitted by the learned Judge of the county court on the case reserved must be answered in the affirmative, viz., that there was evidence on which, as a matter of law, the said Judge could legally find the said Arthur Clark guilty of theft as defined by the Criminal Code.

We cannot direct the conviction to be reversed merely because we may think that on the evidence, as he reports it, he ought to have decided, or that it would have been safer to have decided, differently.

If upon a perusal of the case we are bound to say that there was in point of law evidence which, if the case had been tried by a jury, the Judge must have submitted to them, or which, there being no jury, he was himself—as a jury—free to consider and determine what weight should be attached to it, we have no jurisdiction to interfere, the trial Judge not having given leave to apply for a new trial on the ground that the verdict was against the weight of evidence.

If there was no such evidence, it is within our province to say so, but if there was, then, so far as the case turns upon the conclusion to be drawn from it and from any inferences it was justly capable of, including all questions as to the credibility of the witnesses, the decision cannot be disturbed.

I thought leave to appeal ought to be granted in the present case, because upon the evidence, as reported, I felt a difficulty in understanding how the prisoner could have been convicted, and I desired to have the matter discussed; but after the full argument which we have heard, my difficulty, at all events as to the learned Judge's actual right to decide as he has done, has been removed.

It does appear—and I desire to confine myself strictly, as I am bound to do, to what has been reported to us, without reference to, and, as far as possible, without being in any way influenced by the extraneous circumstances which were dragged in on the argument, and which might or might not furnish convincing proof, were they in evidence, of the prisoner's guilt—it does appear then, that the arrangement which the prisoner entered into with the witnesses Keefer and McBride, in pursuance of

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which the prosecutor's goods were delivered to Holt, was, to begin with, to the knowledge of all of them entirely irregular, and contrary to the rules and regulations of the prosecutor, the employer of the prisoner and Keefer, which provided an efficient check, if obeyed, upon the delivery of goods out of the factory, of tracing them into the possession of the prisoner, and of enabling his employer to make him account for them : secondly, that the goods having been delivered to Holt in pursuance of this arrangement there were no means, in the absence of mere accidental discovery of what had been done, of tracing the goods so delivered : thirdly, that the prisoner, who was entitled to receive payment from Holt for his employer of goods which he might have lawfully obtained from the factory and sold to him in the regular course of business, was in a position to have received payment from him for the goods thus improperly obtained and irregularly delivered without anything appearing in his employer's books or his own to shew it, and that everything was done to have enabled him, if he were so minded, to defraud his employer with comparative freedom from all risk of discovery.

Taking these facts by themselves, they shew that the goods in question were taken, or caused to be taken, by the prisoner without colour of right, with intent to deprive the owner absolutely thereof, these being two of the ingredients of the offence of theft as defined by sec. 305 of the Code.

Was this done by the prisoner fraudulently, which is the third essential ingredient of the offence ?

If the explanations, which were given by the two witnesses I have mentioned, and by the prisoner in the evidence given by him on the trial before the same Judge of some charge against Keefer connected with the same transaction, were to be accepted they would disprove the existence of any intent to defraud, for the prisoner had received no money from Holt, and his professed object, as stated by himself and these witnesses, was to benefit his employer by retaining Holt's business. Holt, it appeared, was a dissatisfied customer, and the prisoner thought he could effect his object by gratifying Holt with a longer credit than he would have had if the goods had been entered, sold and delivered in the regular way.

But the witnesses may have given their evidence in such a manner as to induce the Judge to discredit them, and there is some indication of this in the notes of McBride's evidence, and if so, the Judge was not bound, any more than a jury would have been, to accept or believe the explanation. What the prisoner did (apart from its being a disobedience of orders) might have been done in all good faith and honesty, or it might have been part of a scheme to defraud his employer, and if the Judge thought that the explanation was patched up, to put a good face on what was otherwise a suspicious transaction, we cannot say that under all the circumstances, it was not open to him to take that view.

If the transaction had been irregular merely, Holt might have been able to give important evidence in the prisoner's favour. He was not called (and I think the onus was on the prisoner to call him), and this was a circumstance calculated to throw some doubt on the latter's honesty. So, too, the Judge was at liberty (as a jury are, though they must not be told so) to draw an inference unfavourable to the prisoner from the fact that he did not testify on his own behalf, if, at least, he was dissatisfied with the report of the witness Scott of the evidence given by him on the Keefer trial.

A point was made, that the latter evidence had been improperly admitted, but, notwithstanding Mr. Teetzel's ingenious suggestion, I am of opinion that the 5th section of the Canada Evidence Act, 1893, 56 Vict. ch. 31 (D.), as amended by 61 Vict. ch. 53 (D.), removes, as I read it, the ground for the differences of opinion, which prevailed as to the proper construction of the section as it originally stood: see *Regina v. Hendershot and Welter* (1895), 26 O.R. 678; *Regina v. Williams*, 28 O.R. 583; *The Queen v. Hammond*, 29 O.R. 211.

If when called upon to testify, that witness does not object to do so on the ground that his answers may tend to criminate him, his answers are receivable against him (except in the case the section provides for) in any criminal trial or other criminal proceeding against him thereafter.

If, on the other hand, he does object, he is protected.

One cannot but feel, that the prisoner was placed at considerable disadvantage, in having his case tried before the same

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Judge who had (as we were told on the argument) convicted the two principal witnesses, who testified in his favour for their dealings in the same transaction.

But this is not a circumstance, which warrants us in interfering with the conviction, if there was evidence to support it.

I therefore answer the question stated in the affirmative —there was evidence on which as a matter of law, the Judge could legally find the accused guilty of theft. I feel obliged to say so much; I do not desire to say more.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

G. A. B.



## [DIVISIONAL COURT.]

HUNTER V. BOYD.

D. C.

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Dec. 12.

*Executors and Administrators—Representation ad Litem—Tort—Survival of Action—Death of Party Pending Action—R.S.O. 1897, ch. 129, sec. 11—Con. R. 1897, 194, 195.*

R.S.O. 1897, ch. 129, sec. 11, providing that a person wronged in respect to his person or property by one, since deceased, may maintain an action against the administrators or executors of the latter, does not authorize such an action against an administrator *ad litem* merely, but only against an executor or general administrator, clothed with full power to collect the assets, pay the debts, and divide the estate which he represents:—

*Held*, therefore, that for this, apart from other reasons, the appointment of an administrator *ad litem* should be refused in this action, which was brought against five persons for malicious prosecution, one of whom had died after issue joined but before trial, and whose widow and children refused to administer to the estate.

Judgment of Lount, J., reversed.

THIS was an appeal by Maria Boyd and also by Messrs. Beatty, Blackstock & Co. from an order made on December 3rd, 1901, by Lount, J., under the following circumstances: The present action was brought against William Boyd and four others for damages for an alleged malicious prosecution. After the cause was at issue the defendant William Boyd died intestate on June 4th, 1901, leaving his widow, Maria Boyd, and several children, and leaving an estate not exceeding \$400 in value. The plaintiff thereupon, on June 24th, 1901, obtained from Lount, J., an *ex parte* order appointing the plaintiff's nominee, one Wicks, to represent the estate of Boyd in the action and committing to him the office of administrator *ad litem*, limited to the proceedings in the action in the usual form, and dispensing with the giving of security. The action was then ordered to be continued against Boyd's estate and the other defendants. The action as so constituted came on for trial before Meredith, C.J., at the Toronto Assizes on September 17th, 1901, and upon the fact appearing that the only representative before the Court of the estate of William Boyd was the administrator *ad litem* Wicks he refused to proceed with the trial against his estate, being of opinion that the administrator *ad litem* did not sufficiently represent it, and directed the trial to stand over until a general administrator should be appointed.

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Proceedings were then taken in the surrogate court by the plaintiff to compel the widow or to permit the plaintiff to obtain general administration of the estate. The widow and two daughters have appeared to the citation served upon them and have declined to take out letters of administration; the two sons, being the only other children, are living in the United States, out of the jurisdiction, and have never been served with the citation. The plaintiff applied to Maria Boyd for the address of her sons in the United States but she refused to give it.

The plaintiff then applied to Lount, J., upon notice to Messrs. Beatty, Blackstock & Co. the solicitors who had appeared originally in the action for all the defendants, including Boyd, and who had acted for Maria Boyd since his death in the surrogate proceedings above mentioned, and upon notice also to Maria Boyd, for an order appointing her or Wicks or some other person "to represent the estate" of Boyd in the action, or for an order for leave that the action proceed with leave reserved to Maria Boyd to take out administration to his estate and intervene in the action. An order was thereupon, on December 3rd, 1901, made by Lount, J., in Chambers, confirming his former order of June 24th, 1901, and the proceedings taken thereunder.

The judgment was as follows:—

December 3. LOUNT, J.:—William Boyd, deceased, one of the defendants in this action, died after issued joined and before trial, leaving a widow, Maria Boyd, and four adult children—two sons and two daughters. The widow and daughters reside in the city of Toronto; the sons reside in the United States, but their whereabouts cannot be ascertained by the plaintiff. The deceased left personal property of about the value of \$400, and no other estate. The widow refuses to take out administration to the estate, and, as I understand, the daughters also decline to do so. No personal representative has been appointed. The plaintiff, under the provisions of Rule 194, now asks that some person or persons may be appointed to represent the estate for all the purposes of this action. Objection is taken by Mr. McKay, on behalf of the widow, that the Court or a Judge has no

jurisdiction to make the order, and that if there is jurisdiction this is not a case where such a discretion should be exercised. I am unable to agree with either contention. I think there is ample jurisdiction to make the order asked for: *Curtius v. Caledonian Fire and Life Ins. Co.* (1881), 19 Ch. D. 534; *Joint Stock Discount Co. v. Brown* (1869), L.R. 8 Eq. 376; *Hibernian Joint Stock Co. v. Fottrell* (1884), 13 L.R. Ir. (Ch.) 335.

Upon the material before me I think it is a case for the proper exercise of my discretion in the matter.

I adopt the language of Sir W. M. James, V.C., in *The Joint Stock Discount Co. v. Brown*, at p. 380, "not to allow plaintiffs to be kept at arm's length because one of the defendants has happened to die." I think the whole proceeding on the part of the widow and her solicitors has been and is to keep the plaintiff at arm's length and to prevent him from further proceeding with the action as against the estate of the deceased. It appears to me that the proper order to make is substantially the same as was made in *The Joint Stock Discount Co. v. Brown*. I will, therefore, appoint Samuel Theophilus Skee Wicks, who consents, to be the representative, unless within five days after the service of this order the widow of William Boyd, deceased, or his solicitors on this record, or either of them, should appear and elect to represent the estate, in which case the widow and the solicitors, or she or they, will be appointed.

And I direct that personal service upon the said widow be dispensed with, and that service of the said order upon the said widow be effected by mailing a copy thereof by registered letter to her post-office address in the city of Toronto.

The costs of this application will be costs in the cause.

From this judgment the present appeal was brought by Maria Boyd and by Messrs. Beatty, Blackstock & Co. It was argued before the Divisional Court consisting of FALCONBRIDGE, C.J. K.B., and STREET, J., on December 12th, 1901.

*Robert McKay*, for Maria Boyd, and Beatty, Blackstock & Company, contended that no liability survived in this case except by virtue of R.S.O. 1897, ch. 129, sec. 11, and that gave

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a right only against a general executor or administrator, and not against a mere administrator *ad litem*; and that the plaintiff not being a creditor could not administer: *In re Clook* (1890), 15 P.D. 132; *In the Goods of Mauritz Von Desen* (1880), 43 L.T.N.S. 532; *In the Goods of Richard Galbraith* (1879), 3 L.R. Ir. (Ch.) 169; *In the Goods of William Coles* (1863), 3 Sw. & Tr. 181; *Baynes v. Harrison* (1856), 1 Deane 15; and that Rule 194 did not apply to an action of this kind, and in any event it was not proper to allow the solicitors to intervene: *Beckitt v. Wragg* (1868), 1 Ch.Ch. 5.

*G. G. S. Lindsey*, K.C., contended that an administrator *ad litem* was within R.S.O. 1897, ch. 129, sec. 11: *Davis v. Chanter* (1848), 2 Ph. 545; *Cameron v. Phillips* (1889), 13 P.R. 141; and also referred to *Lince v. Faircloth* (1891), 11 C.L.T. Occ. N. 49; *Mason v. Town of Peterborough* (1893), 20 A.R. 683; *Hibernian Joint Stock Co. v. Fottrell*, 13 Ir. L.R. (Ch.) 335.

December 12. STREET, J. [after stating the facts of the case, as above]:—There is abundant authority for holding that the powers conferred upon the High Court by Rules 194 and 195 should be used in cases of necessity only and that the circumstances of each case in which the application is made are to be examined for the purpose of satisfying the Court that the case is a proper one for the exercise of the discretion given it of acting upon the rules: *Dowdeswell v. Dowdeswell* (1878), 9 Ch. D. 294; *Hughes v. Hughes* (1881), 6 A.R. 373; *Rodger v. Moran* (1896), 28 O.R. 275; *Daniell's Chy. Prac.*, 6th ed., p. 208, and cases there cited.

The reason for the cautious exercise of these powers is not difficult to discover. The applicant is usually the plaintiff who is seeking relief against a defendant; the defendant dies and relief is sought against his estate; under these Rules the plaintiff is driven to appoint his own nominee by force of the fact that the natural representatives of the estate refuse to administer. Where the Court is driven to exercise the power the general result is that the plaintiff appoints his own nominee against whom he straightway proceeds to establish his claim; and the person so appointed, having no right to collect any of the assets



of the estate which he is appointed to represent, and no knowledge of its affairs, has no means of fighting the claim of the plaintiff against it, which, therefore, so far as he is concerned, must, almost as a matter of course, go by default. The evil is minimized by the fact that the Courts have refused to appoint a representative under these Rules where the deceased person is the only party to the record interested in opposing the plaintiff's claim: *Gibson v. Wills* (1856), 21 Beav. 620; but there yet remains, in every case in which an estate is sought to be fixed with a liability, the unsatisfactory consideration that the judgment obtained against it has been practically *ex parte* and that, notwithstanding, it is binding upon a proper representative of the estate should one subsequently be appointed. Its effect is merely to establish the right of the plaintiff against the estate without enabling him to enforce his right until a general representative is appointed. This limited effect of a judgment obtained by a plaintiff against an administrator *ad litem* indicates to some extent the cases to which appointments under the Rules should be limited. Where the object is merely to make the record complete and an estate to which no executor or administrator has been regularly appointed is a necessary party for the purpose without having any substantial interest in the result, either by reason of insolvency or otherwise, the Rules seem of safe and proper application. But where the object of the action is directly to recover a judgment against an estate which is not a necessary party to the action, there the Court may properly, under ordinary circumstances, refuse to make an order under these Rules for the reason that a judgment against the limited administrator being in fact merely declaratory of the plaintiff's rights against the estate and not enforceable against it until a proper administrator is appointed, the plaintiff may as well wait for a proper administrator before proceeding at all against the estate.

I think that these considerations are of use in considering first, whether any power existed for the appointment of an administrator *ad litem* in the present case, and second, whether, if the power existed, the discretion to exercise it has been properly exercised.

It is perfectly clear to begin with that the estate of Boyd

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is not a necessary party to the present action, but that it is a proper party, that is to say, the action might be continued against the other defendants whether the estate of Boyd were continued a party or not; and I think it is also not to be disputed that under sec. 11 of R.S.O. 1897 ch. 129 an action for a tort begun in the lifetime of a defendant may be continued against his executors or administrators after his death within the time limited by the Act. That section is the authority for the claim against Boyd's estate for his torts committed when he lived, and it is as follows:—

“11. In case any deceased person committed a wrong to another in respect of his person or his real or personal property the person so wronged may maintain an action against the executors or administrators of the person who committed the wrong. The action shall be brought at latest within one year after the decease. . . .”; and by sec. 12 it is provided that in estimating the damages under this section “the benefit, gain, profit, or advantage, which in consequence of or resulting from the wrong committed, may have accrued to the estate of the person who committed the wrong shall be taken into consideration and shall form part or constitute the whole of the damages to be recovered.”

The 194th Rule does not authorize the appointment by the Court of an administrator *ad litem*, but only of a person to represent the estate. The 195th Rule is that upon which the order appealed against was made, and it is as follows:—

“Where probate of the will of a deceased person, or letters of administration to his estate, have not been granted and representation of such estate is required in any action or proceeding in the High Court, the Court may appoint some person administrator *ad litem*.”

Rule 194 is taken, with some additions, from the English Chancery Jurisdiction Improvement Act, 15 & 16 Vict. ch. 86, sec. 44 (1).

Rule 195 is taken from sec. 1 of the Con. Rule 311, which was taken from 48 Vict. ch. 13, sec. 11.

Rule 311 gave authority to the Court to appoint either an administrator or an administrator *ad litem*, and required security

from the person appointed and notice of the appointment to the surrogate court.

In the present Rules there is no power to appoint a general administrator, but only an administrator *ad litem*.

At common law the liability of Boyd for the tort in question ceased at his death, and the only right the plaintiff has is the right given by sec. 10 above set forth to sue his "executors and administrators" within one year after his death. I have been able to find little to guide me in the way of authority, but I find myself obliged to come to the conclusion that there is no authority in this section to maintain an action against an administrator *ad litem* merely. The question to be determined is whether the intention of the Legislature was to give the right of action against one who was merely an administrator *ad litem* as well as to one who was an administrator in the ordinary sense of the term, that is to say, a general administrator clothed with full power to collect the assets, pay the debts and divide the estate. It is not the ordinary question as to the propriety of appointing an administrator *ad litem* to the estate of a deceased defendant for the purpose of filling up a gap in the parties necessary to the action, but a question going to the very root of the plaintiff's right to maintain his action at all against the estate of the deceased, and, therefore, as I have said, the question to be determined is whether an administrator *ad litem* is included within the description "administrators" in the Act giving the right of action.

I am of opinion that we should not give to the word "administrators" in the section in question the wide construction asked for by the plaintiff. It is possible that with a different context its meaning might be so extended, but its surroundings here are entirely against an extension of the ordinary meaning of the word, which includes only the persons having full power of administering the assets of a deceased person. It is coupled with the word "executors," which is some indication of the sense in which it is used; then the section plainly contemplates the existence of "executors or administrators" as persons who must be clothed with those representative capacities before an action can be maintained for the tort of the deceased, and does not contemplate them as per-

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sons who may come into existence, as an administrator *ad litem* must, after the commencement of the action.

The accident in the present case of the action being already pending against the deceased for the tort at the time of his death adds something to the plausibility of the plaintiff's argument without having a bearing upon the real question to be determined. That the persons against whom the statute intends the right of action to lie were the general administrators and not persons appointed merely to fill a blank space in the record is further strongly shewn by the provision in sec. 11, which gives as the sole basis of the damages in certain cases the gain resulting to the estate of the deceased tortfeasor from the wrong for which the action is brought, involving an inquiry in such cases into the amount of such gain, an inquiry which could not be properly entered upon in the absence of an administrator having control of the assets of the deceased and bound to know and account for them.

I might further refer to the statute 48 Vict. ch. 13, sec. 11 (O.), above alluded to, as containing a Legislative recognition of the difference between the office of an administrator and an administrator *ad litem*.

I am of opinion for these reasons, and with great respect for the contrary view taken by my brother Lount, that he had no power to order the appointment of an administrator *ad litem* to the estate of William Boyd for the purposes of the present action, and that, therefore, both his orders should be set aside, and that the plaintiff should pay the costs of the application for the order and of the present appeal.

FALCONBRIDGE, C.J., agreed in the result.

A. H. F. L.

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Dec. 5.

## LEE V. CANADIAN MUTUAL LOAN AND INVESTMENT CO.

*Mortgage—Building Society—Monthly Payments—Maturity of Shares—Depreciation of Assets—Deduction from Amount Credited to Shareholders—Right to Discharge—Novation—Interest—Premium—Bonus—R. S. O. 1887, ch. 169, sec. 38—R. S. O. 1897, ch. 205, sec. 21—R. S. C. 1886, ch. 127, sec. 3.*

The plaintiff became a member of and mortgaged his lands to a building society incorporated under R. S. O. 1887, ch. 169, as collateral security for repayment of the value of his stock which had been advanced to him, which stock he covenanted to assign forthwith to the company and to repay its par value in 96 monthly payments, "as per rules, terms and conditions of the company"; and he signed ninety-six promissory notes accordingly, which included interest at six per cent. and forty cents per share per month, bonus or premium. Afterwards the company sold out to another similar company and the plaintiff accepted shares in the latter in lieu of his shares in the former, contracting at the same time to observe the by-laws of the latter company, one of which provided that the monthly dues under mortgages must continue to be paid "until maturity of the pledged shares." Having paid the ninety-six notes he claimed a discharge. Owing, however, to a depreciation in the value of the assets of the vendor company, thirty-eight per cent. had had to be deducted from the amount credited on the plaintiff's shares, and a discharge was therefore refused:—

*Held*, that there had been a complete novation and change of membership by the plaintiff from one company to the other; and that the plaintiff was not entitled to a discharge till he had paid his proportion of the deficiency resulting from the depreciation of assets.

*Held*, also, that R. S. C. 1886, ch. 127, sec. 3, relating to interest on mortgages and embodied in R. S. O. 1897, ch. 205, sec. 21, has no application to such a building society mortgage as that in question; and that, moreover, the rate of interest charged was only six per cent., because the bonus or premium, which was authorized by R. S. O. 1887, ch. 169, sec. 38, was not to be considered as interest.

THIS was an action for a declaration that a certain mortgage had been fully paid off and discharged, and for repayment by the defendant company of all sums paid on account of the said mortgage other than principal moneys, or in the alternative, for judgment against the defendant company for the difference between the amount of principal and interest paid by the plaintiff and that reserved in the mortgage. The circumstances are set out in the judgment of MACMAHON, J., before whom it was tried without a jury on October 17th, 1901.

G. Ross and W. J. Clark, for the plaintiff, contended that his obligation to the defendant company was merely to pay the notes remaining unpaid at the time of the assignment of his mortgage to them; that the so-called bonus was only interest

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within R.S.C. 1886, ch. 127; and that *Williams v. Dominion Permanent Loan Co.* (1901), 1 O.L.R. 532, was distinguishable by the clause in the mortgage there requiring payment until the shares should have matured; and referred to *Clark v. Harvey* (1888), 16 O.R. 159; *Barry v. Anderson* (1891), 18 A.R. 247; *Philpott v. President, etc., of St. George's Hospital* (1857), 6 H.L. 138; Maxwell on Statutes, 3rd ed., at p. 157.

*G. F. Shepley*, K.C., and *A. M. Macdonell*, for the defendants, contended that there was a complete novation, all shareholders of the Standard Loan and Savings Co. assenting to the transfer to the defendant company, which then held the mortgage as security for fulfilment of the plaintiff's obligations in respect to his new stock; and that the Building Societies Act, R.S.O. 1887 ch. 169, secs. 56, 57, 60, takes such a mortgage as the one in question out of the usury laws altogether; and referred to *Ex parte Bath*, *In re Phillips* (1884), 27 Ch. D. 509; *Canadian Mutual Loan and Investment Co. v. Burns* (1900), (see *infra*, p. 198); Wurtzburg on Building Societies, 3rd ed., p. 176; Thornton & Blackledge on Building Societies, sec. 334; Endlich's Law of Building Associations, sec. 130, *et seq.*; *Canada Building Society v. Rowell* (1860), 19 U.C.R. 124; *Crone v. Crone* (1879), 26 Gr. 459; *Canada Permanent Building and Savings Society v. Harris* (1865), 16 C.P. 54; *Burbidge v. Cotton* (1851), 5 DeG. & S. 17; *The Western Canada Loan and Savings Society v. Hodges* (1875), 22 Gr. 566.

December 5. MACMAHON, J.:—On November 7th, 1891, the plaintiff applied to the Standard Loan and Savings Co.—a company incorporated under the Building Societies Act, R.S.O. 1887 ch. 169—for membership therein, and subscribed for twelve shares of its stock, and on the 9th a certificate was issued to him for twelve shares, of the value of \$100 each.

On the day when the certificate was issued, the plaintiff applied for a loan of \$1,200 on the property mentioned in the statement of claim, “repayable in eight years as *per* the rules, terms and conditions of the company.”

On December 1st, 1891, the plaintiff executed a mortgage in favour of the Standard Loan Co. for \$1,200, and by the terms of the mortgage he agreed, in consideration of such

advance, to pay to the said company the sum of \$18.49 monthly until November 1st, 1899, such monthly payment being made up of \$7.20 subscription to said shares, \$4.80 being forty cents per share per month bonus or premium for receiving such shares in advance prior to the sum being realized, and \$6.49 being interest at six per cent. per annum on \$1,200, and he agreed to submit to the by-laws and rules of the company, and to assign the said shares to the company forthwith. The mortgage recites that it "is given as collateral security for the due fulfilment of the said agreement, and the fulfilment of his obligations as a member of the company;" and it is also provided that the "mortgage is to be void on the fulfilment of the hereinbefore recited agreement, and upon payment of taxes and performance of statute labour, and all the covenants and provisosoes thereafter contained."

The mortgage also contains the following covenant on the part of the plaintiff:—"It is agreed by the said member and anyone claiming under him that the said advance of \$1,200 is made by the company to the said member as a privilege of such membership, and by reason of his having signed the said by-laws and rules, and assigned the said stock to the said company, and that these presents are taken as collateral security only, the advance being made upon the said stock, the provisions made as to the repayment thereof by the said by-laws and rules, and the hereinbefore recited agreement." \*

The only rules then in force to which reference need be made is contained in article 3, sub-secs. 1 and 3: (1) "The funds of this company can be loaned on the stock of the company with a real estate mortgage as collateral security, or on the stocks of the company which have been in force for two years without other security. (3) Loans on stocks alone shall not exceed seventy-five per cent. of its cash value; loans on stock

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\* The mortgage also contained a covenant by the plaintiff with the company "that he will duly and punctually from time to time make the several payments as aforesaid according to the above proviso, and also that he will observe and perform the by-laws and rules for the time being of the said association with respect to the said shares and the repayment of the said advance, and will pay all fines and forfeitures imposed on him under the said rules and by-laws."—Rep.



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with collateral security shall be repayable in ninety-six monthly payments."

The Standard Co. obtained from the plaintiff ninety-six promissory notes for \$18.49 each, bearing date of December 1st, 1891, the last one being payable in ninety-six months after the date thereof. All these notes were paid and retired by the plaintiff as they matured.

The Standard Co. was not prosperous, and on June 8th, 1893, at a meeting of the shareholders of the company they ratified an agreement transferring the assets, franchise, etc., of the company to the defendants, The Canadian Mutual Loan and Investment Co., which had also been incorporated under the Building Societies Act. The agreement between the two companies, which is dated June 8th, provides that the securities of the Standard Co. shall be taken over at a valuation, and that all the accrued profits to the date of the transfer, after payment of the liabilities of the company, should be divided ratably amongst the shareholders in good standing of the Standard Co. in proportion to the value of their shares on the date of the transfer, as a credit on the stock allotted to them by the Canadian Mutual Loan and Investment Co.—the Canadian Mutual Loan and Investment Co. agreeing to pay all the liabilities of the Standard Co.

On June 21st the plaintiff signed an application addressed to the Standard Loan Co., to withdraw all his shares in that company, and directed that the amount to the credit of his stock be applied upon the stock in the Canadian Mutual Co. to be allotted to him in pursuance of his application for membership sent therewith, which application is dated June 21st, 1893, and is signed by him and addressed to the Canadian Mutual.

The Canadian Mutual sent to the plaintiff a share certificate for twelve shares of stock therein, which was forwarded to, and, as I find, received by the plaintiff, together with a pass-book which contained the then existing rules of that company. The conditions on which the certificate is issued and accepted by the shareholder are printed on the face thereof, the fourteenth condition being:



"The by-laws of this company are part and parcel of this contract, and in addition to this certificate of shares, are hereby accepted as part of the contract between the company and the shareholder."

The rules of the Canadian Mutual which were in force at the time of the transfer and certificate of membership issued to the plaintiff were the rules of 1891, article 3, sec. 3 of which provided that: "Interest at the rate of six per cent. per annum will be charged on all mortgages, which interest must be paid monthly with the monthly dues on or before the first Tuesday in each month until the maturity of the said shares, and a premium of forty cents per month will be charged on each \$100 borrowed, which premium must be paid on or before the first Tuesday in each month for the period of seven years, or until the maturity of the pledged shares should they mature before the expiration of the seven years."

In the amended rules of 1894, article 3, sec. 3, the words in the above rule: "For the period of seven years or until the maturity of the pledged shares should they mature before the expiration of the seven years," are omitted, and the following substituted therefor: "Until maturity of the pledged shares."

The pass-book sent to the plaintiff by the Canadian Mutual was never used by him as he paid the promissory notes as they matured.

There is no doubt that the plaintiff was led to believe from the printed application furnished for the loan by the Standard Co. that the loan was to be repaid in eight years, and from the company obtaining from him the ninety-six promissory notes in accordance with the by-laws (article 3, sec. 3) that the whole amount of the loan and the interest thereon would be paid and satisfied when the last of the promissory notes was retired. And having paid the ninety-six promissory notes he presented to the defendant company a discharge of the mortgage, which they refused to execute.

The plaintiff withdrew his shares from the Standard and accepted in lieu thereof a stock certificate of the Canadian Mutual for twelve shares of the stock of that company. There

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was, therefore, a complete novation and change of membership by him from the Standard to the Canadian Mutual.

Had there been no depreciation in the value of the assets of the Standard Co., the plaintiff's loan would have been paid off when the ninety-six promissory notes were paid at maturity. But there was a depreciation in the value of such assets to the extent of thirty-eight per cent., and the plaintiff as a shareholder under his contract and the by-laws became liable to pay his proportion or share of such deficiency, and until such payment was made he could not compel the defendant company to discharge the mortgage taken as collateral security for the stock loan.

In *Williams v. Dominion Permanent Loan Co.*, 1 O.L.R. 532, the by-law in force at the time the loan in that case was made for regulating loans by the company on stocks with real estate mortgages as collateral security, provided—as did the by-law of the Standard Co. when the plaintiff became a borrower—for the repayment of the loan in ninety-six monthly payments. It is true in the *Williams* case the covenant for payment was “that the mortgage payments should be paid according to the rules and by-laws until the shares shall have matured,” and counsel for the plaintiff Lee urged that a wide distinction was thereby created between that case and the present. But as pointed out by the learned Chancellor in the *Williams* case, at p. 538, the members of a building society “are subject to the rules or by-laws duly enacted from time to time; or, in other words, to by-laws for the time being—by-laws passed to meet future requirements of the company; that is one of the incidents of membership and corporate existence expressly provided for in the constitution of the body, and committed to the hands of the members duly assembled.”

The mortgage being incorporated with the by-laws the payments on the mortgage must be made until the maturity of the shares: rules of 1894, article 3, sec. 3; and according to sec. 6 of article 3, shares are matured when by payments and profits credited the full amount of \$100 on each share has been received by the company: see *Seagrave v. Pope* (1851), 1 DeG.

M. & G. 783; *Mosley v. Baker* (1849), 3 DeG. M. & G. 1032n; Wurtzburg on Building Societies, 3rd ed., p. 176; Thornton & Blackledge on Building Societies, sec. 334; *Hodgins v. Ontario Loan and Debenture Co.* (1882), 7 A.R. 202; *Williams v. Dominion Permanent Loan Co.*, 1 O.L.R. 532, at pp. 538-9.

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As already stated, the Standard Co., instead of yielding profits, had a large deficit, and according to the evidence the plaintiff's shares, instead of being paid up at the end of the ninety-six months, were deficient some \$500 or \$600 of their matured value.

There has not, I conceive, been a violation of what is commonly called the Usury Act, R.S.C. 1886, ch. 127, sec. 3, which has been embodied in the Loan Companies Act, R.S.O. 1897 ch. 205, sec. 21. The loan was made on the stock held by the plaintiff and assigned by him to the company, the mortgage being taken under the authority of sec. 57 of the Building Societies Act, R.S.O. 1887, ch. 169, which authorizes a building society to "advance to members on the security of investing on unadvanced shares of the society, and may receive and take from any person or persons . . . real or personal security of any nature or kind whatever as collateral security for any advance made to members of the society." This takes the case out of the provisions of the Usury Act. But without regard to the provisions of sec. 57, it will be seen that there has been no violation of the usury laws. Of the three sums going to make up the \$18.49, for which sum each of the ninety-six notes was given, \$7.20 was the amount of the monthly subscription towards payment of the shares, and \$4.80 was the bonus or premium received by the company under the authority of sec. 38 of the Building Societies Act, R.S.O. 1887 c. 169, which provides that: "Every society may, besides interest, receive from any member a bonus on any share for the privilege of receiving the same in advance prior to the same being realized;" and the \$6.49 is stated in the mortgage as being six per cent. per annum on \$1,200, as to which I will refer hereafter. The bonus or premium is expressly received by the society not as interest, but in addition to the interest provided by the rules of the company to be paid, and outside of any legislative authority on the question the Court of Appeal, in *Ex parte Bath*, 27 Ch. D. 509, held that a

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"premium" agreed to be paid by a borrower from a building society was not in the nature of interest. Lindley, L.J., said at p. 514: "I am quite satisfied that this premium has nothing to do with interest. It is a sum which is not altogether arbitrary because it is calculated with reference to the duration of the loan. . . . There is nothing illegal in it, nothing uncommon, nothing oppressive, and it appears to me it would be an entire mistake to call it interest in any sense or shape." The premium is not a repayment by the borrower of any part of the amount which he has borrowed, nor can the taking on the part of the society be deemed usurious.

The question as to the effect of the Usury Act on a mortgage containing like provisions as to payment of premium, as in the case in hand, was considered in 1900 by the Supreme Court of Nova Scotia, in the case of *The Canadian Mutual Loan and Investment Co. v. Burns*, in which I have been furnished with a copy of the appeal book on an appeal by the defendant from the judgment of Judge Wetherbee,\* who decided that point and all other questions raised on the pleadings in favour of the plaintiffs; and the assistant reporter of the Supreme Court certified that at the conclusion of the argument before the full Court the appeal was dismissed—the Court being unanimous.

There was an error in stating in the mortgage that the sum of \$6.49, forming part of the amount of each note, was interest at the rate of six per cent.; and in taking the accounts the plaintiff is entitled to credit for the excess of interest paid on each note.

As already stated, the plaintiff was fully justified in believing that the payment of the notes would relieve his property from the mortgage, and he so understood the contract he had entered into, and he was not disabused of this view as to his legal rights until after the last note had been paid. It is a great burden on the plaintiff to be called upon to pay the additional sum he must now meet, and could I on any known principle do so, I would relieve him from the payment of costs. There was no fraud or misrepresentation on the part of the mortgagees, and they must be paid their costs. The plaintiff is entitled to redeem on the usual terms.

A. H. F. L.

\* May 19th, 1900. Not reported.



[IN CHAMBERS.]

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Jan. 8.

*Parties—Numerous Defendants in Same Interest—Application for Appointment of Solicitor to Defend—Con. Rule 200—Non-applicability of.*

The object of Con. Rule 200, which provides that where there are numerous parties having the same interest, one or more of them may sue, or be sued, or may be authorized by the Court to defend on behalf of, or for the benefit of, all so interested, is to avoid the expense and inconvenience of bringing before the Court a numerous body of persons, all having the same interest; but the Rule does not authorize the making of an order by the Court, on the plaintiff's application, for the appointment of a solicitor to defend for a number of persons in the same interest, who are already defendants to the action.

THIS was a motion made *ex parte* on behalf of the plaintiff for an order, under Con. Rule 200,\* for the appointment of a solicitor to represent all the defendants in the action, except the original defendant, an infant defendant, and a defendant Joseph Ward; and that service of the statement of claim, as amended, on such solicitor be deemed good and sufficient service on the defendants he is appointed to represent.

The motion was heard before MEREDITH, C.J.C.P., in Chambers, on 25th November, 1901.

W. J. Elliott, for the motion.

January 8. MEREDITH, C.J.:—The proceedings were begun in the surrogate court, where the plaintiff propounded an instrument bearing date 22nd August, 1900, as the last will and testament of Ellen Jane Ward, deceased, and sought to have granted to him, as the executor named in it, probate thereof.

The grant was opposed by the original defendant, Thomas Elroy Benson, and an order was made removing the proceedings into the High Court, whereupon the plaintiff delivered a statement of claim by which he claims to have the will proved in solemn form, and probate of it granted to him as the executor thereof.

\* 200. In an action where there are numerous parties having the same interest, one or more of such parties may sue or be sued, or may be authorized by the Court to defend on behalf of, or for the benefit of, all parties so interested.

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On the 16th November, 1901, on the application of the plaintiff, an order was made for adding the next-of-kin of the deceased, other than the plaintiff and defendant, as parties to the action, and they have been added accordingly.

The parties added number in all ten: one of them is an infant, three of them live in the United States of America, and the remainder of them, including the infant, in this Province; they all, except Joseph Ward, have the same interest in the matter in litigation as the original defendant, who was the only one of the next-of-kin who made any opposition in the surrogate court to the granting of probate.

The plaintiff now applies under Con. Rule 200 for an order appointing a solicitor to represent all of these defendants, except the original defendant, the infant defendant, and the defendant Joseph Ward; and that service of the amended statement of claim on the solicitor be good and sufficient service on the defendants he is appointed to represent.

The application is entirely misconceived. The rule gives no authority to appoint a solicitor to represent defendants, but where there are numerous parties having the same interest, to authorize one or more of such parties to defend on behalf or for the benefit of all parties so interested.

The object of Rule 200 was to apply to proceedings in the High Court, a practice which had obtained in the Court of Chancery for very many years, and, as was said by Lord Macnaghten, speaking of the corresponding English rule in *The Duke of Bedford v. Ellis*, [1901] A.C. 1, at p. 10, the practice since the rule remains very much as it was a hundred years ago. See also *Wood v. McCarthy* [1893], 1 Q.B. 775, where the origin and extent of the application of the rule are dealt with.

It appears to be obvious, when the purpose of the rule as applicable to persons to be sued is considered—the saving of expense and the inconvenience of bringing before the Court a numerous body of persons all having the same interest—that it can have no application to the case of persons who are already made defendants. In a case coming within the rule, the plaintiff may, without any leave being obtained, make defendants one or more of such persons, but in order that the others of the class

who are not before the Court may be bound by the proceedings, an order must be obtained authorizing some person who is a party to defend on their behalf.

If one who is made a defendant may be authorized to defend for others who are also defendants, what is to be the further procedure? Is he to be required to appear and deliver a statement of defence on their behalf, and if he is not, and does not, is the case to be dealt with as if these defendants had made default in appearing or pleading, or both? If he is to be required to do all this—and, according to *Wood v. McCarthy*, he may practically be directed against his will to defend for the others in the same interest—how is he to be indemnified for the expense he is put to? These considerations, and there may be others, make it clear, I think, that what is meant is what I have said, that a party to the action may be authorized to defend for others in the same interest, so as to dispense with the necessity of making them defendants; in other words, his defence is the defence of all.

I have found no case in which one defendant was authorized to defend for another person in the same interest who was also a defendant, unless it be the unreported case of *Winkley v. Winkley*, referred to in Snow's Annual Practice, 1901, page 160, and it is impossible from the short reference there made to the case to understand what the facts of it were.

The language in which Rule 200 is couched is not well chosen. It differs from that of the English rule, from which it was derived—Order 16, Rule 9—and also from its prototype in our original Judicature Act—Order 12, Rule 10. Each departure from the original has, I think, not been in the direction of improvement; but however that may be, I do not think that in making these changes in the phraseology of the rule it was intended to alter its scope or effect.

If the plaintiff thought that his case could be brought within the provisions of the rule—as to which I express no opinion—instead of taking an order adding all the persons interested who were not already parties as defendants, he might have obtained an order that the defendant on the record be authorized to defend for them, or an order might have been

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obtained to add one or more of them, and authorizing the parties so added to defend for the others.

See *Cornell v. Smith* (1890), 14 P.R. 275, at p. 277.

The application is refused.

G. F. H.

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Dec. 31.

## [IN THE COURT OF APPEAL.]

## HILL v. HILL.

*Alimony—Action by Lunatic—Right to Maintain—Summary Judgment—Con. Rule 616.*

On a motion to the Court of Appeal for leave to appeal from the judgment of the Divisional Court, reported in 2 O.L.R. 541, affirming the decision of Meredith, C.J.C.P., (1) that the plaintiff in the action was not entitled to alimony, and (2) that on a motion for summary judgment under Rule 616 he could pronounce judgment dismissing the action, the Court of Appeal were of the opinion that the judgment was right, and leave to appeal was refused.

THIS was a motion for leave to appeal from the judgment of the Divisional Court, affirming the judgment of Meredith, C.J.C.P., in Court, dismissing a motion for judgment, in an action for alimony, on the grounds: (1) That on the case made by the admissions of fact contained in the pleadings and the examination of the defendant for discovery, she was entitled to a decree for alimony; and (2) That on an application under the provisions of Con. Rule 616, the learned Chief Justice had no jurisdiction to dismiss the action; but only, in the event of his refusing the application, to dismiss the motion.

The plaintiff, a lunatic, the wife of the defendant, by her next friend, brought this action against the defendant, her husband, for alimony; and after issue joined therein, and after examination of the defendant for discovery, applied to the Court, under the provisions of Con. Rule 616, for an order that judgment be entered for the plaintiff as prayed in her statement of claim; and for such further and other order as she might be entitled to upon the admissions of fact contained in the pleadings and the examination of the defendant for discovery.

The application was heard by Meredith, C.J., in Court



who, after hearing counsel for both parties, dismissed the action. The judgment is reported 2 O.L.R. 289.

The plaintiff thereupon appealed from this judgment to the Divisional Court, when the judgment of the learned Chief Justice was affirmed, and the appeal dismissed. The judgment is reported 2 O.L.R. 541.

The Divisional Court, after hearing this appeal, dismissed the same with costs.

The plaintiff then applied to the Court of Appeal for leave to appeal to that Court from the judgment pronounced by the Divisional Court.

The motion was heard before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 9th December, 1901.

*S. H. Bradford*, for the motion.

*W. R. Riddell*, K.C., contra.

December 31. The judgment of the Court was delivered by ARMOUR, C.J.O.:—As to the first ground, the judgment of the learned Chief Justice was plainly right.

No ground was shewn upon the admissions of fact contained in the pleadings and the examination of the defendant for discovery to warrant a decree for alimony.

The defendant denied all the charges of misconduct towards the plaintiff contained in the statement of claim; but he admitted that, because the plaintiff had become a dangerous lunatic, he laid an information under the provisions of sec. 12 of the R.S.O. 1897, ch. 317, upon which information such proceedings were had that the plaintiff was duly committed, as a person insane and dangerous to be at large, by the justice of the peace who heard the matter of the said information, to the common gaol.

And the plaintiff claimed that the taking of these proceedings by the defendant entitled her to a decree for alimony against him.

But in taking these proceedings, the defendant was only doing what he had a legal right to do, and his statement of defence and examination for discovery shewed that he had reasonable and proper grounds for taking them, and his taking

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these proceedings could not be held to be legal cruelty, and furnished no ground for a decree for alimony.

As to the second ground. The learned Chief Justice had jurisdiction to dismiss the action.

By the Imperial Act, 15 & 16 Vict., ch. 86, it was thus provided :

Section 15. "The plaintiff in any suit commenced by bill shall be at liberty, at any time after the time allowed to the defendant for answering the same shall have expired (but before replication), to move the Court, upon such notice as shall in that behalf be prescribed by any general order of the Lord Chancellor, for such decree or decretal order as he may think himself entitled to; and the plaintiff and defendant respectively shall be at liberty to file affidavits in support of and in opposition to the motion so to be made, and to use the same on the hearing of such motion : and if such motion shall be made after an answer filed in the cause, the answer shall, for the purposes of the motion, be treated as an affidavit."

Section 16. "Upon any such motion for a decree or decretal order, it shall be discretionary with the Court to grant or refuse the motion, or to make an order giving such directions for or with respect to the further prosecution of the suit as the circumstances of the case may require, and to make such order as to costs as it may think right."

In *Robinson v. Lowater* (1854), 2 Eq. R. 1070, "Mr. Craig submitted whether, on a motion for a decree, an order could be made dismissing the bill, and whether more could be done than to refuse the motion." "The Lord Justice Turner. The Court has power to make a decree on motion. Here the decree is an order dismissing the bill."

In *Thomas v. Bernard* (1858), 5 Jur. N.S. 31, Kindersley, V.-C., after quoting the provisions of 15 & 16 Vict., ch. 86, sec. 16, said : "So far the Court has the widest discretionary power to deal with a motion for a decree that the justice of the case can require. But in exercising that power the Court must consider the exigency of the case, and may either make a decree as prayed, may dismiss the bill, may direct enquiries, may order the suit to be proceeded with in a particular manner, or may refuse the motion."

In *Warde v. Dickson* (1858), 5 Jur. N.S. 698, Kindersley, V.-C.; said: "This case comes on upon a motion for a decree; and when a cause comes on in that form it is competent for the Court either simply to refuse the motion, leaving the case in *statu quo*; or to make a decree, either, with or without costs; or to order the motion to stand over, in order that further evidence may be adduced."

No greater power was conferred upon the Court by sections 15 and 16 of the Act 15 & 16 Vict., ch. 86, than is conferred upon the Court by Con. Rule 616, and the decisions above cited are, therefore, authorities shewing that the learned Chief Justice had jurisdiction to dismiss this action.

Reference may also be had to Order 16 of the Chancery General Orders of 1853, and to the following cases decided thereunder: *McLaughlin v. Whiteside* (1859), 7 Gr. 515; *Wilson v. Cassey* (1868), 14 Gr. 80; *Mathers v. Short* (1868), 14 Gr. 254. As also to Order 40, Rule 11, of the Supreme Court of Judicature Act, 1875, from which Con. Rule 616 is taken; and the case of *Pascal v. Richards* (1881), 44 L.T.N.S. 87, as to the effect to be given to the word "relief" in the rule.

Leave refused, with costs.

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Dec. 14.

[MEREDITH, C.J.C.P.]

## RE ELIZA GOUGH ESTATE.

*Trusts and Trustees—New Trustee—Appointment of—Married Woman.*

Under the Trustee Act, R.S.O. 1897, ch. 129, a married woman was appointed a trustee to fill a vacancy under the circumstances set out in the report.

THIS was a petition by Thomas J. Day, the sole surviving trustee under the last will and testament of Eliza Gough, in her life-time of the town of Peterboro', deceased, wife of Alexander Gough of the said town of Peterboro', merchant, asking for the appointment of Augustine Joseph Gough, of the said town of Peterboro', merchant, son of Eliza Gough, and Sarah Emma Walsh, of the city of Stratford, in the county of Perth, a married woman, and daughter of the said Eliza Gough, to act with the petitioner as trustees under the said will.

The will was dated the 21st March, 1891, under which the said Alexander Gough, one John McElderry and the petitioner were appointed trustees and executors.

Alexander Gough died on the 30th April, 1896, and John McElderry renounced probate; and on the 9th June, 1896, probate of the said will was granted to the said petitioner.

The will provided that:—"After the death of any of my trustees, or whenever a vacancy occurs for any reason, I direct the remaining two to meet and appoint some fit and proper person to supply the place of the deceased or now acting trustee, and the said trustees, when appointed in writing under the hand of the survivors and in the terms of the will, shall have all the powers and duties of the deceased or now acting trustees; and if for any reason or cause there should, at any time, be only one remaining trustee he may apply to a Court of competent jurisdiction to order that the vacancies may be filled up."

The accounts of the petitioner had been duly passed, and all the provisions of the will carried out except with regard to certain real property in the city of Guelph, which had been devised to the trustees in trust for a daughter, Mary Elizabeth



Gough, viz., for her support, as long as she lived, and after her death, the property was to be sold and the proceeds to be equally divided among the testatrix's children then alive, or the children of any deceased child. The said Mary Elizabeth Gough was in delicate health and lived with the said Sarah Emma Walsh who took care of her.

All the adult parties beneficially interested in the estate consented to the appointment asked for.

The petition was heard before MEREDITH, C.J.C.P., in the Weekly Court, on the 9th day of October, 1901.

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*J. E. Day*, for the petitioner.

*F. W. Harcourt*, for the official guardian.

December 14. MEREDITH, C.J.:—The petition asks for the appointment of Augustine Joseph Gough and Sarah Emma Walsh, a married woman, to act with the petitioner as trustees under the will of Eliza Gough, deceased, he being the sole surviving trustee.

All the persons beneficially interested who are adults consent to this being done, and the official guardian, on behalf of the infant beneficiaries, approves of the proposed appointment.

In the circumstances of this case, I think that I may properly make the order asked, notwithstanding what is said by Mr. Lewin in his work on Trustees, 10th ed., pp. 32-3, as to the inadvisability and impolicy of the appointment of a *feme covert* to be trustee.

See *Re Kaye* (1866), L.R. 1 Ch. 387.

The order should be made under the authority conferred by the Trustee Act, and the costs will be payable out of the trust estate in the usual way.

G. F. H.

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Oct. 4.

[MOSS, J. A.]

## BOYS' HOME v. LEWIS.

*Interest—Irregular Judgment—Moneys Retained Under—Absence of Fraud or Misconduct—Order to Refund.*

Where executors, who were also residuary legatees, acting *bonâ fide* under a judgment afterwards held by the Court of Appeal to be irregular and not binding on the parties concerned, retained a greater sum of money than they were subsequently held entitled to, but were exonerated from all fraud, or misconduct, they were held not chargeable with interest.

IN this case there were two appeals from the local Master at Hamilton; but the judgment reported has reference to the first objection only.

The objection was made on behalf of the children of one Sarah Uffner, legatees under the will of one David Evans, who complained that the Master had erroneously held that the plaintiffs, the Boys' Home, and the defendants Lewis and Morgan were not liable for interest upon the amounts to be repaid by them under the judgment of Armour, C.J., as modified by the judgment of the Court of Appeal.

The plaintiffs the Boys' Home and the defendants Lewis and Morgan, as legatees under the same will, had received a share of the residue of the estate in excess of the amount they would have been entitled to had the whereabouts of the children of Sarah Uffner, who afterwards established their claims, been known, and had been ordered to repay the sum so received by them.

The facts are fully set out in the case in appeal, which is reported in 27 A.R. 242.

The appeal was argued before Moss, J.A., sitting in Weekly Court at the request of Meredith, C.J.C.P., on September 11th, 1901.

*D'Arcy Tate*, for the appellants.

*G. F. Shepley*, K.C., and *Bell* for the defendants John Lewis and Robert Morgan.

*J. V. Teetzel*, K.C., and *Lewis*, for the plaintiffs the Boys' Home.

*F. W. Harcourt*, for the official guardian.

October 4. MOSS, J.A.:—As regards the liability of the Boys' Home, Mr. Tate, for the appellants, argued but faintly against the Master's ruling; but as regards the liability of the defendants Lewis and Morgan, he urged strongly that they are chargeable with interest on the amount they retained in excess of the amount which it now appears they were entitled to. The Master's ruling was based upon the same evidence as was before the Court of Appeal.

The amounts received or retained were so received or retained under the authority of a judgment of the Court. The proceedings which led to the judgment have been held to have been irregular and not binding on the appellants, but I think it must be considered that all parties concerned have been exonerated from all charges of fraud or wrongful intent in connection with the proceedings. The executors were allowed their costs by the Court of Appeal, which would not have been the case if the Court had considered them guilty of fraud or misconduct. I think they must be considered and treated as legatees who have been overpaid by inadvertence and without fraud or misconduct on their part. There is no part of the estate now remaining in which they have an interest.

The principle laid down by Lord Eldon, followed by Sir George Jessel, M.R., in *Jervis v. Wolferstan* (1874), L.R. 18 Eq. 18, and adopted in *Barber v. Clark* (1890), 20 O.R. 522, affirmed in appeal (1891), 18 A.R. 435, is applicable alike to the Boys' Home and the defendants Lewis and Morgan, and the Master's ruling must be affirmed with costs.

Reference may also be made to *Chamberlain v. Clark* (1882), 1 O.R. 135, affirmed in appeal (1883), 9 A.R. 273. The application there was to compel creditors to refund amounts received beyond their *pro rata* share. They were treated as overpaid legatees and ordered to refund, but the order only directed payment of the principal and was silent as to interest.

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## CANADIAN MINING AND INVESTMENT CO. v. WHEELER.

Feb. 5.

*Judgment Debtor—Examination of Transferee—Third Mortgagee—“Exigible under Execution”—Rule 903.*

A third mortgage upon real estate made by a judgment debtor is not a transfer of property “exigible under execution,” within the meaning of Rule 903, and the third mortgagee is not, therefore, liable to be examined as a person to whom such a transfer has been made. The words quoted refer to legal execution and do not include equitable execution or the appointment of a receiver.

AN application by the plaintiffs, who were execution creditors of the defendant, for an order under Rule 903 for the examination of a person as a transferee of the defendant.

The alleged transfer was a mortgage on certain lands belonging to the debtor, who had given two prior mortgages thereon to other persons.

Rule 903 provides: “Where judgment has been obtained . . . the Court or a Judge, on the application of the judgment creditor, may order . . . any person . . . to whom the debtor has made a transfer of his property or effects, exigible under execution, since the date when the liability or debt which was the subject of the action in which judgment was obtained was incurred, . . . to attend . . . and to submit to be examined upon oath as to the estate and effects of the debtor . . . .”

The motion was heard by Mr. Winchester, the Master in Chambers, on the 23rd January, 1902.

*W. R. P. Parker*, for the plaintiffs.

*J. J. Maclellan*, for the alleged transferee, contended that he was not a person “to whom the debtor has made a transfer of his property or effects, *exigible under execution*,” within the meaning of Rule 903. It was true that the debtor had given this person a mortgage on real estate, but it was a third mortgage, and therefore was not a transfer of property exigible under execution: *Samis v. Ireland* (1879), 4 A.R. 118, at p. 122.



*Parker*, in reply. The words "exigible under execution" include equitable execution and the appointment of a receiver: *In re Pope* (1886), 17 Q.B.D. 743.

February 5. THE MASTER IN CHAMBERS:—The former Con. Rule 928, from which the present Rule 903 (under which this application is made) is taken, was not limited by the words "exigible under execution." These words were for the first time added to the present Rule at the last consolidation, and were apparently taken from similar words used in 56 Vict. ch. 5, sec. 9 (O.) This section became Rule 904 in the last consolidation of the Rules, and, no doubt, Rule 903 was made to harmonize with Rule 904 in this respect. This term "exigible under execution" in the Act referred to meant a legal execution only, as that statute related exclusively to "certain duties, liabilities, and fees of sheriffs;" and I am of opinion that the same meaning attaches to these words in Rule 903 as in sec. 9 of 56 Vict. ch. 5, and that equitable execution or the appointment of a receiver is not included by their use. As to the difference between a legal and equitable execution, I would refer to *In re Shephard* (1889), 38 W.R. 133.

The motion must be refused.

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## [DIVISIONAL COURT.]

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Jan. 21.

RE McINTYRE—McINTYRE v. LONDON AND WESTERN  
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*Trustees—Will—Annuities—Setting apart Securities—Distribution of Residue—  
Realization of Estate—Investments—Redemption of Annuities out of Estate—  
Consent.*

An order made under Rule 938 declared that the persons interested in the residue of the estate of a testator were entitled to have sums set apart by the executors and trustees, from time to time, from the capital of the estate, to provide for annuities bequeathed by the testator, as sufficient funds for that purpose came to the hands of the executors, or to have such sums applied by them in the purchase of Government annuities, and, after provision made for the payment of the specific legacies and the annuities, to have the residue in the hands of the executors from time to time distributed among the persons entitled. The order also provided that, in the event of differences as to matters arising under the foregoing declaration, a local Master should determine such differences and give necessary directions :—

*Held*, that the order was substantially right. The annuitants were not entitled to have the estate of the testator realized and converted into money further than might be necessary for the payment of his debts and funeral and testamentary expenses; their right was limited, after this had been done, to having the annuities sufficiently secured by the setting apart of such part of the estate as might be adequate for that purpose; and, there being in the hands of the executors and trustees proper trust securities amply sufficient to secure all the annuities and to leave a surplus presently available for distribution among the persons entitled to the residue, there was no necessity to convert these securities into money; and it would suffice to set apart securities for such an amount as, calculating the interest to be derived from it at the rate of four per cent. per annum, would produce a yearly sum equal to the amount of the annuities to be provided for.

*In re Parry* (1889), 42 Ch. D. 570, and *Harbin v. Masterman*, [1896] 1 Ch. 351, followed.

*Held*, also, that these matters could properly be determined and an inquiry directed upon an originating notice under Rule 938 brought on by one of the persons entitled to the residue.

*In re Medland, Eland v. Medland* (1889), 41 Ch. D. 476, at p. 492, and *In re Parry*, *supra*, followed.

The order also directed that, in the event of the parties agreeing or the Master directing that any sum be expended on the purchase of Government annuities, the annuitant might elect to receive such sum in discharge of his annuity, and that the same should, on the execution of a proper discharge, be paid to the annuitant :—

*Held*, that it is only when the persons whose estate is liable to pay an annuity, in this case those entitled to the residue, and the annuitant, both consent, that an annuity may be redeemed out of the estate; and the order should be varied so as to require that consent.

MOTION under Rule 938, on behalf of David McIntyre, as plaintiff, for an order directing the defendants the London and Western Trusts Company, the executors of the will of Hugh McIntyre, deceased, to pass their accounts as executors, and directing that such a provision as may seem just and proper to

the Court be made by the executors for the securing of the various annuities charged upon the estate by the will, and directing the executors to distribute the residue of the estate amongst the persons entitled under the will; or for an order for the administration by the Court of the personal estate of the testator.

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The will appointed the company executors and trustees, bequeathed a number of annuities, devised several parcels of land to different members of the testator's family, and directed that the balance of the estate, if any, should be divided equally among "my heirs," and "if any of my children tries to break this will, they to be cut off without anything." The estate was worth \$74,500.

The motion was heard by BOYD, C., in Chambers, on the 27th May, 1901.

*A. B. Aylesworth*, K.C., for the plaintiff.

*G. F. Shepley*, K.C., for the defendants the executors.

*J. Folinsbee* and *T. Urquhart*, for some of the other defendants interested under the will.

May 30. BOYD, C.:—I think the parties interested in the residue are entitled to have sums set apart to answer the annuities, from time to time, as sufficient assets are in the hands of the executors, *or* to have sums applied in the purchase of Government annuities in the same way, from time to time, as shall seem most expedient to the Master, if the parties (including the annuitants) differ. Costs of application, and, if reference, then of that, out of estate.

The order issued (1) declared that the parties interested in the residue of the estate, after payment of the various specific legacies and annuities bequeathed by the will, were entitled to have sums set apart by the executors, from time to time, from the capital of the estate, to provide for the annuities charged on the estate, as sufficient funds for that purpose should come to the hands of the executors, or to have such sums applied by the executors in the purchase of Government annuities in the same way, from time to time, for the benefit of the annuitants under the will, and, after provision should have been made for

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payment of the specific legacies and annuities bequeathed by the will, to have the residue in the hands of the executors, from time to time, distributed amongst the parties entitled, and ordered the same accordingly; (2) ordered that in the event of differences arising between the parties, including the annuitants, as to whether there were sufficient funds in the hands of the executors for the purposes aforesaid, or the amount that should be set apart as aforesaid, or as to the methods to be adopted by the executors in the application of the funds, or any other matters arising under the above declaration, there should be a reference to determine such difference and to give necessary directions; (3) ordered that, in the event of the parties agreeing or the Master directing that any sum be expended on the purchase of Government annuities, the annuitant might elect to receive such sum in discharge of his annuity, and the same should, on the execution of a proper discharge, be paid to such annuitant.

The defendants the executors appealed from this order, upon the following grounds:—(1) There was no pretence that the executors were not proceeding regularly, expeditiously, and honestly with the administration of the estate, and no ground whatever was shewn for interference by the Court with them in the performance of their duties in the course of the administration. (2) The order appealed from assumes to abrogate or modify the provisions of the testator's will and to substitute other provisions therefor. (3) The scheme embodied in the order is inconsistent with the express directions of the will. (4) The scheme contemplates the diversion of the estate from purposes of the will to the purchase of Government annuities or the payment of lump sums of money in lieu of the annuity benefits given by the will. (5) The scheme does not put all annuitants upon an equal footing, but provides for the bringing about of preferences between annuitants in accordance with the discretion of the Master. (6) The scheme is illusory and impracticable. (7) Many of the annuitants are infants, and no order ought to have been made substituting for the provisions of the will in their favour other and different provisions.



The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., and LOUNT, J., on the 17th October, 1901.

*G. F. Shepley*, K.C., for the appellants and the widow.

*A. B. Aylesworth*, K.C., for David McIntyre, the respondent.

*M. D. Fraser*, for Hugh McIntyre.

*J. Folinsbee*, for six children and eight grandchildren of the testator.

*D. Urquhart*, for the Baptist Home Mission Fund.

*F. W. Harcourt*, for the infants.

The authorities cited are discussed in the judgment.

January 21. MEREDITH, C.J.:—This is an appeal by the London and Western Trusts Company from an order of the Chancellor of Ontario, bearing date the 30th May, 1901, and made on the application of the respondent David McIntyre, for an order that the appellants do pass their accounts before the local Master at London, and for a direction that such a provision as may seem just and proper be made by them for securing the annuities charged upon the estate of the testator by his will, and that the appellants be directed to distribute the residue of the estate, after making this provision, between the parties entitled to it under the will, or for an order for the administration of the personal estate of the testator by the Court.

The application was opposed by the appellants, who are the executors, and by certain of the beneficiaries under the will, and was supported by others of the beneficiaries.

The order made by the learned Chancellor treats the application as having been made under the provisions of Con. Rule 938, and declares that the persons interested in the residue are entitled to have sums set apart by the appellants, from time to time, from the capital of the estate, to provide for the annuities, as sufficient funds for that purpose come to the hands of the appellants, or to have such sums applied by the trustees in the purchase of Government annuities in the same way, from time to time, for the benefit of the annuitants, and, after provision has been made for payment of the specific legacies and the annuities, to have the residue in the hands of the appellants from time to time distributed amongst the parties entitled, and orders and adjudges the same accordingly.

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The order further provides, in the event of difference between the parties, including the annuitants, as to whether there are sufficient funds in the hands of the appellants for the purposes before mentioned, or the amount that should be set apart, or as to the application of the said funds, or any other matters arising under the declaration contained in the order, for a reference to the local Master at London to determine such differences and to give such directions as may be necessary.

The order also directs that, in the event of the parties agreeing or the Master directing that any sum be expended in the purchase of Government annuities, the annuitant may elect to receive such sum in discharge of his annuity, and that the same shall, on the execution of a proper discharge, be paid to the annuitant.

It was not disputed by counsel for the appellants, or by counsel for those in the same interest with them, that it is the duty of the appellants, when and as sufficient funds for the purpose came to their hands, to make provision for securing the annuities by setting apart sufficient sums to meet the claims of the respective annuitants, and, after making proper provision for all the annuities and for the discharge of all other prior claims or charges on the estate, from time to time to divide the residue of the estate between those who are entitled to it under the terms of the will, but what was objected to is that, as was contended, the effect of the order is, to take from the appellants the right to exercise the discretion which the testator has reposed in them, of administering the affairs of his estate, and therefore of determining what sums should be set apart to secure the annuitants and what sums should from time to time be distributed among those who are entitled to the residue, and that, as was also contended, without any evidence that the appellants had misconceived or misunderstood what their duty was or did not intend to perform it faithfully; and it was further objected that the order makes provision for the redemption of the annuities at the will of the annuitants or in the discretion of the Master, instead of its being provided that that should take place only with the consent of all the persons interested in the residue as well as of the annuitants.

If the provision of the order as to the redemption of the annuities is to be read as the appellants read it, it cannot be supported, for it is clear that it is only when the persons whose estate is liable to pay an annuity and the annuitant both consent to that being done, that an annuity may be redeemed out of the estate. I have the authority of the learned Chancellor for saying that it was not his intention to permit the annuities to be redeemed unless with the consent of those who are entitled to the residue as well as of the respective annuitants, and that if the order provides otherwise it is wrong and should be varied so as to require that consent before such application of the residuary estate is made.

The other branch of the appeal presents more difficulty, but, after the best consideration I have been able to give to it, I have come to the conclusion that the order appealed from is substantially right.

It was manifest from the argument that the views of the contending parties are wide apart as to the manner and circumstances in which the admitted duty of the appellants as to setting apart a fund to meet the annuities and distributing the residue of the estate among the persons entitled to it, is to be performed.

It is clear that the annuitants are not entitled to have the estate of the testator realized and converted into money further than may be necessary for the payment of his debts, funeral and testamentary expenses, but that their right is limited after this has been done to having the annuities sufficiently secured by the setting apart of such part of the estate as may be adequate for that purpose: *In re Parry* (1889), 42 Ch. D. 570.

The extent of the security which an annuitant is entitled to have for the payment of his annuity is to be determined on the principles laid down in *Harbin v. Masterman*, [1896] 1 Ch. 351; and *Hicks v. Ross*, [1891] 3 Ch. 499, may also be referred to, though in the latter case the question was as to the sum to be paid to an annuitant who was willing to receive a present cash payment in lieu of his annuity.

The course which the appellants proposed to adopt, as I understand from the affidavits of their manager, and as I gathered from the argument of counsel on their behalf, was not

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in accordance with what is laid down in the cases to which I have referred as the proper course to be taken.

There are, as I understand, in the hands of the trustees securities, of a character such as trustees may properly invest trust moneys in, amply sufficient to secure all the annuities and to leave a surplus presently available for distribution among the persons entitled to the residue, and there is no necessity to convert (as the appellants appear to think is their duty) these securities into money. The appellants also, I think, have taken a mistaken view as to the amount which it is necessary to set apart to meet the annuities. In my view, the securities being of the character I have mentioned, it will suffice to set apart securities for such an amount as, calculating the interest to be derived from it at the rate of four per cent. per annum, will produce a yearly sum equal to the amount of the particular annuity to provide for which the securities are set apart. That rate will, I think, be quite low enough, having regard to the number of the annuitants and their varying ages.

Is there then any reason why these questions should not be decided on the present application?

The proceeding by originating notice for inquiries and directions without administration is equivalent to the old Chancery practice of commencing an administration suit raising the particular point by the pleadings, obtaining an inquiry or direction upon that point, and then staying further proceedings.

This was decided on the English Rule, which corresponds with our Con. Rule 938, by the Court of Appeal in *In re Medland, Eland v. Medland* (1889), 41 Ch. D. 476, at p. 492, where the course adopted was to direct an inquiry in Chambers, substantially the same course as that adopted by the Chancellor in this case, the only difference being that the reference directed by him is to the local Master.

The question dealt with in *In re Parry*, a somewhat similar case to this, was raised upon an originating summons, in which, as here, one of the persons who were entitled to the residue was the plaintiff.

I venture to hope that, now that we have outlined the principle upon which, in our opinion, the appellants should act in making provision for the annuities and distributing the



residue, there will be no necessity for the expense being incurred of a reference to the Master, and in order to guard against the costs of a reference being unnecessarily incurred, I would vary the order as to costs by reserving the question of the costs of any reference which may be had to be dealt with by a Judge in Chambers after the report has been made.

With this variation, and that I have mentioned as to the redemption of the annuities, the order appealed from should be affirmed, and the appeal from it dismissed, and the costs of all parties of the appeal should be paid out of the estate; the costs of the appellants to be as between solicitor and client.

LOUNT, J. :—I agree.

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[DIVISIONAL COURT.]

CHEVALIER v. ROSS.

*Pleading—Amendment—Increasing Amount Claimed—Mistake—Money Paid into Court—Acceptance by Mistake.*

D. C.  
1901  
Dec. 30.  
1902  
Feb. 12.

The plaintiff was allowed under Rule 312 to amend his statement of claim in an action upon a building contract by increasing the amount claimed for extras, and to amend his reply by changing acceptance into non-acceptance of money paid into Court by the defendant, notwithstanding that the plaintiff had filed a memorandum of acceptance, under Rule 423, although he had not taken the money out of Court; the Court being satisfied that the plaintiff had made a mistake, and, on finding it out, had moved with reasonable promptness to correct it, and that no real prejudice was done to the defendant.

*Emery v. Webster* (1853), 9 Ex. 242, followed.  
Order of Lount, J., affirmed.

THIS was an appeal by the plaintiff from an order of the local Master at Cornwall refusing the plaintiff's application for leave to amend his statement of claim and reply.

The action was upon a building contract. The facts are stated in the judgments.

The appeal was heard by LOUNT, J., in Chambers, on the 20th December, 1901.

D. C.

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Lount, J.

*J. H. Moss*, for the plaintiff.*I. F. Hellmuth*, for the defendant.

December 30. LOUNT, J.:—The plaintiff applied to the local Master at Cornwall for leave to amend his statement of claim by increasing the amount claimed for extras in paragraph 3 by \$79.33, thereby making the claim \$199.90, instead of \$120.57; and to amend paragraph 1 of his reply by inserting the words “does not” before the word “accepts,” and by striking out the letter “s” from the word “accepts,” thereby making the paragraph to read: “That the plaintiff does not accept the money paid into Court by the defendant in satisfaction of the cause of action set out in the said third paragraph.” The learned Master refused the application, and the matter comes before me by way of an appeal from his order.

From the material before me, and which was before the learned Master, I am of the opinion that the amendments should have been allowed. I think it is apparent that there was at least a mistake on the plaintiff's part in instructing his then solicitors, and that as soon as he made discovery of the mistake, which was in his not claiming the full amount which he alleged, and, as I think, believed, was due to him by the defendant, he moved with reasonable diligence and without loss of time to have the error corrected, and no undue advantage can be taken of, or injury done to, the defendant by allowing the amendments, while the refusal may prevent the plaintiff from recovering an amount fairly due to him.

Rule 312 provides: “The Court or a Judge may at any time amend any defect or error in any proceedings; and all such amendments may be made as are necessary for the advancement of justice, determining the real matter in dispute, and best calculated to secure the giving of judgment according to the very right and justice of the case.”

I think this case is one where the Rule applies with full force, and that it is most proper and right to invoke it for the purpose of the advancement of justice, in determining the real matter in dispute, and to secure the giving of judgment according to the very right and justice of the case.

In *Cropper v. Smith* (1884), 26 Ch. D. 700, at p. 710, Bowen, L.J., said: "I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party:" and this appears to be the conclusion arrived at in this Province under Rule 312: see *Williams v. Leonard* (1895), 16 P.R. 544 and (1896), 17 P.R. 73. No injustice can be done to the defendant. The money was paid into Court; the plaintiff filed an acceptance, but, in my opinion, under a mistake of facts; it has not been taken out of Court; and, as I have said, the plaintiff promptly applied on discovery of the mistake to repudiate the acceptance and to correct the mistake.\*

*Emery v. Webster* (1853), 9 Ex. 242, is a case in support of the present contention, and, in my opinion, justifies the view I have taken in granting this appeal.

I therefore reverse that portion of the learned Master's order refusing the application of the plaintiff, and give leave to him to make the amendments mentioned; but, so that no injustice may be done to the defendant, I give leave to her to withdraw the money paid into Court, and to plead as she may be advised to the amended statement of claim, and I give leave to the plaintiff to reply as he may be advised to any such amendments. As to the costs, the mistake having been made by the plaintiff, I do not interfere with the learned Master's disposition thereof in his order, and I direct the costs of this appeal to be costs in the cause.

The defendant appealed from this decision, and his appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ., on the 21st January, 1902.

*I. F. Hellmuth*, for the defendant, discussed the cases cited in the judgment below, and also referred to *Magann v. Ferguson* (1898), 18 P.R. 201; *Attorney-General v. Tomline* (1877), 7

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\* Rule 423.—(1) A plaintiff taking the money out of Court shall take it in satisfaction of the very cause of action, or part thereof, in respect of which it was paid in, and shall upon applying therefor file and serve a memorandum according to Form No. 53, which shall be equivalent to a satisfaction piece.

Form No. 53—Take notice that the plaintiff accepts the sum of \$        paid by you into Court in satisfaction of his claim herein (or of his claim for, etc.)

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Ch. D. 388; *Davis v. Davis* (1880), 13 Ch. D. 861; *Harvey v. Croydon Union Rural Sanitary Authority* (1883-4), 26 Ch. D. 249; *Wilding v. Sanderson*, [1897] 2 Ch. 534.

*J. H. Moss*, for the plaintiff, referred to Rules 312 and 423, and relied on the cases cited in the judgment of Lount, J.

February 12. The judgment of the Court was delivered by FALCONBRIDGE, C.J.:—I entirely agree with the learned Judge appealed from in finding that the filing of the memorandum according to Form 53 was a mistake on the part of the plaintiff or of his former solicitors, and that, as soon as the mistake was discovered, he moved with all reasonable promptness to correct it.

*Emery v. Webster*, 9 Ex. 242, decided nearly half a century ago, when the practice was much stricter than it is at present, is abundant authority for my learned brother's judgment, and it is a stronger case than the present one, for there the money had actually been taken out of Court.

The defendant is amply protected by the provision in the order allowing her to withdraw the money paid into Court, and to plead as she may be advised.

The appeal will be dismissed with costs to be paid forthwith after taxation.

E. B. B.



[MOSS, J.A.]

## RE VOTERS' LISTS OF CARLETON PLACE.

1902

Feb. 11.

*Parliament—Voters' Lists—Notice of Complaint—Form of—Grounds of Objection—Subjoined Lists—Amendment of Notice.*

In a list of complaints contained in a notice of complaint under the Ontario Voters' Lists Act, R.S.O. 1897, ch. 7, the names of persons wrongfully omitted from the voters' list were given, and in the column headed "grounds on which they are entitled to be on the voters' list," "M.F. and" appeared:—

*Held*, having regard to the provisions of sec. 6 (1) and (7) and Form 6 (list 1) of the Voters' Lists Act, and of secs. 1 (12), 13, and 56 of the Assessment Act, and of sec. 4 of the Manhood Suffrage Registration Act, that the letters "M.F." could properly be read as meaning "Manhood Franchise," and those words were sufficient for the purposes of the notice, while the word "and" should be treated as surplusage.

2. The notice of complaint consisted of fifteen sheets, each in itself in the form given in the schedule to the Voters' Lists Act as No. 6, the lists Nos. 1, 2, 3, and 4 being printed on the backs of forms of notices of complaint; only the notice of complaint on the last sheet was filled out and signed by the complainant; but evidence was given that the whole fifteen sheets were attached together when the complainant signed the notice, and handed the whole to the clerk; and they so appeared before the Court. The notice referred to the "subjoined lists:—"

*Held*, that the lists were part of the complaint, and it was sufficient in that regard.

3. *Held*, that, if it were necessary, in order to make the notice of complaint a good one, to amend it so that it should refer explicitly to the annexed sheets, the amendment should not be allowed under sec. 32.

In the matter of the revision of the voters' lists for the municipality of the town of Carleton Place for 1901, at the request of an elector, the Judge of the county court of Lanark submitted the following questions to the Court of Appeal under sec. 38 of the Ontario Voters' Lists Act, R.S.O. 1897, ch. 7.

1. At the sitting of the Court to hear and determine the several complaints of errors and omissions in the voters' lists, held on the 12th day of November, 1901, and adjournment thereof, it was objected that in the notice of complaint the printed "M.F. and" did not disclose any ground of complaint within the meaning of the Act. Without calling for evidence, I expressed the opinion that "M.F." had, in connection with voters' lists matters, acquired the meaning of "manhood franchise," and the word "and" could be treated as surplusage. Was I right?

2. The notice of complaint as filed consists of fifteen sheets, each in itself in the form No. 6 in the Act, the lists Nos. 1, 2,

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3, and 4 being printed on the back of the notice of complaint; only the notice of complaint on the last sheet was filled out and signed by the complainant; but evidence was given that the whole fifteen sheets were attached together as they now appear when the complainant signed the notice of complaint on the last sheet, and handed the whole to the clerk; I expressed the opinion that, considering it my duty to further the franchise, while entertaining great doubts, the notice was sufficient. Was I right?

3. The complainant asked leave to amend, if necessary, under sec. 32 of said Act, by making the signed notice refer explicitly to the annexed sheets. I refused the amendment upon the ground that, if there was any necessity for it, the effect would be to confer jurisdiction on myself, and that sec. 32 can be satisfied in its words by confining it to notices other than the notices of complaint. Am I right?

The case was heard by MOSS, J.A., on the 1st February, 1902.

*G. H. Watson*, K.C., for electors protesting against the rulings of the county court Judge. The letters "M.F." in the lists affixed to the notice do not indicate any ground of complaint. By the Voters' Lists Act, R.S.O. 1897, ch. 7, sec. 6, subsecs. 7, 9, 14, and 15, the clerk of the municipality has authority to use these letters in making out the lists, but there is no such authority for its use here. When the notices have been handed to the clerk, the proceeding ceases to be a private matter, and becomes one of public concern. The statutory right to make complaint should, therefore, be exercised in strict accordance with the statutory provisions. Moreover, the statute lays down a certain form of notice of complaint, to which the complainant has not adhered. By sec. 32 the Judge has power to amend a notice when a proper and sufficient notice is before him. There is no such notice in this case. The form in the schedule to the Act is part of the Act: *Attorney-General v. Lamplough* (1878), 3 Ex. D. 214, at p. 229. The notice given in this case is not a sufficient notice under the Act. He cited *Bartlett v. Gibbs* (1843), 5 M. & G. 81; *Nicholls v. Bulwer* (1870), L.R. 6 C.P. 281; *Foskett v. Kaufman* (1885), 16 Q.B.D. 279; *Hircum v*

*Hilleary*, [1894] 1 Q.B. 579; *Plant v. Potts*, [1891] 1 Q.B. 256; *Melaugh v. Chambers* (1886), [1898] W.N. 119; *Beenlen v. Hockin* (1846), 4 C.B. 19; *Freeman v. Newman* (1883), 12 Q.B.D. 373.

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*Edmund Bristol*, for electors supporting the Judge's rulings. The English statutes upon this subject, in that they require service of the notice of complaint upon the person objected to, as well as upon the clerk, and because the powers of amendment contained therein are very limited, do not furnish a guide for the construction of the Ontario Voters' Lists Act, and the English cases cited do not support the proposition that no amendment of the notice of complaint in question here can properly be made: see secs. 26 and 32 of the Act; Con. Rule 312. Section 32 is wide enough to include all notices, and does not refer only to notices given by the clerk: see *Howitt v. Stephens* (1855), 5 C.B.N.S. 30; *Townshend v. St. Marylebone* (1871), L.R. 7 C.P. 143. The letters "M.F." have acquired, by constant usage, the recognized meaning in voters' lists matters of "manhood franchise," and are so used in R.S.O. 1897, ch. 7, sec. 6, sub-secs. 7 and 15, and in Form 1; R.S.O. 1897, ch. 8, sec. 1; *ib.* ch. 224, sec. 13, sub-sec. 13. The form of notice of complaint given in the schedule to the Voters' Lists Act contemplates that the notice of complaint shall be printed above the list of names objected to, and the notice is referred to as "the above notice" (see Form 6.) In this case the list of complaints was printed on the back of the notice, and referred to "the subjoined notice." Upon reading the notice in the last sheet, which was the only one filled in and signed, the lists to which it is fastened are literally "subjoined." There has been a sufficient compliance with the statute, and no person has been injured by the slight deviation from the form prescribed: *Re Voters' Lists of Marmora and Lake* (1900), 2 Elec. Cas. 162; *Re McCulloch and Judge of Leeds and Grenville* (1874), 35 U.C.R. 449. The notice being valid, the Judge had ample power to amend: *Halton Case* (1878), *Hodgins on Voters' Lists*, 2nd ed., p. 226.

*Watson*, in reply. Fifteen separate forms are here used, and they are not "subjoined." The notice not being sufficient, the Judge has no power to amend.

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February 11. MOSS, J.A.:—Case stated by the Judge of the county court of the county of Lanark, and referred by His Honour the Lieutenant-Governor in Council under sec. 38 of the Ontario Voters' Lists Act.

In proceeding with the revision of the voters' lists for the town of Carleton Place certain objections were raised before the learned county Judge, who ruled thereon, and, at the request of an elector, submitted three questions which are set out in the case. I deal with them in their order.

1. Under the provisions of the Voters' Lists Act it is the duty of the clerk of each municipality, immediately after the final revision and correction of the assessment roll in every year, to make a correct alphabetical list in three parts of all persons being of the full age of twenty-one years and subjects of His Majesty by birth or naturalization and appearing by the assessment roll to be voters in the municipality : sec. 6 (1).

The assessment roll referred to is that prepared by the assessor or assessment commissioner under the provisions of the Assessment Act. By sec. 1 (12) of that Act it is declared that "list of voters" shall mean the alphabetical list referred to in sec. 6 of the Voters' Lists Act.

The Assessment Act makes it the duty of every assessor to prepare an assessment roll, in which, after diligent inquiry, he shall set down, according to the best information to be had, certain particulars in separate columns, and amongst others (column 4), statement whether the person is a freeholder, or tenant, . . . and where, in any municipality in which the Manhood Suffrage Registration Act is in force, the person is qualified to vote at municipal elections therein as well as at elections for the Legislative Assembly, there is also to be inserted "opposite his name in said columns, in capitals, the letters 'M.F.', meaning thereby 'manhood franchise:'" sec. 13,

By sec. 4 of the Manhood Suffrage Registration Act the assessor is forbidden to place opposite the name of any person in the assessment roll the letters "M.F." unless such person is qualified to vote at municipal elections as well as at elections for the Legislative Assembly.

By sec. 56 of the Assessment Act the assessor is required to deliver the assessment roll when completed by him to the clerk



of the municipality, and it is this roll as finally revised and corrected by the court of revision and the county Judge that the clerk afterwards uses in preparing the voters' list as directed by sec. 6 of the Voters' Lists Act.

Among other directions to the clerk with reference to the preparation of the list, contained in sec. 6, is that found in sub-sec. (7) that in the case of a person qualified to vote under the provisions of the Ontario Election Act he (the clerk) shall, opposite the name of such person, in the proper column of the voters' list, state that fact either by inserting in such column the words "Manhood Franchise" or the letters "M.F."

The foregoing provisions, which are *in pari materiâ*, sufficiently indicate to all who peruse them that the letters "M.F.," when found in connection with the franchise or the lists of persons having or claiming the right to vote at elections, are intended to mean "manhood franchise" as a description of qualification to vote.

In the form of lists given as part of Form 6 in the Schedule of Forms to the Voters' Lists Act there is set forth in list No. 1, among the grounds on which persons wrongfully omitted from the voters' list are entitled to be on it, the words "Manhood Franchise Voter." In the list in question in this case these words do not occur, but I think, having regard to the provisions above referred to, that the letters "M.F.," which do occur in the place where the words "Manhood Franchise Voter" might be used, can properly be read as meaning "manhood franchise," and undoubtedly these words are sufficient for the purposes of the notice. The word "and," which was probably suggested by Part I. of Form 1 of the Act, may well be treated as surplusage.

The Legislature did not intend to bind parties to exact observance of the words of the forms (sec. 4).

What is intended is that the list should afford such information of the nature of the qualification of the person named as will enable the other voters to ascertain by inquiry the truth or untruth of the statement. In this instance I cannot imagine voters or other persons who usually interest themselves in the revision of the lists being misled by the form of the statement. The right of a person to be on the voters' list ought not to

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depend upon a too critical examination of the forms in the schedule, which are inserted merely as examples and are not required to be followed implicitly.

For these reasons I shall certify to His Honour that the ruling of the learned county Judge was right.

2. I think this question may be treated as really one of fact. It has been determined in a former case\* that evidence may be received by the county Judge to shew the condition of the notice of complaint and lists when they came into the clerk's custody. In this case the originals, which I have seen and examined, are firmly attached together. There is only one notice of complaint, and no objection can be made to it in point of form. It must be read before the other papers attached to it, not only because it is the document specially referred to in sec. 17 of the Act, but because that is the natural order in which to read them, and it is necessary to do so in order to a proper understanding of the lists. When read it is found to refer to subjoined lists. It was argued that the lists could not be said to be subjoined, but I think it is impossible to say they are not subjoined. They are annexed or attached, and to annex or attach is to subjoin. Looking at the lists and reading them in the light of the notice, I think there is no sufficient ambiguity to lead to the rejection of any of them on the ground that they are not part of the complaint.

I shall therefore certify to His Honour my opinion that the ruling of the learned county Judge was right.

3. If the learned Judge's ruling that sec. 32 of the Voters' Lists Act may be satisfied by confining it to notices other than notices of complaint was intended to extend to the exclusion from the operation of that section of all power to amend in respect of notices of complaint and the lists which form part of them, I am not as at present advised prepared to follow him that far.

I am inclined to think that, assuming the notice and lists to be properly before the Judge, an item, such, for example, as a misnomer or a plain mistake in description or the statement of polling subdivision or of the part of the clerk's list in which

\**Re Voters' Lists of Marmora and Lake* (1900), 2 Elec. Cas..162.

the name of a voter appears, might be amended. And these are only suggested out of many possible cases.

But in the case of a notice defective in some material respect, as, for example, an unsigned notice, which renders it valueless as a foundation for the proceedings which the Judge is authorized to take upon receipt by the clerk of a notice in conformity to the Act, I agree that there is no jurisdiction to amend.

In this particular case if the amendment asked had been necessary, the learned Judge was right in refusing to make it. And I shall so certify to His Honour.

I desire to add that, although the notice and lists in this case have been held sufficient, I do not wish to be understood as favouring a disregard of the forms prescribed by the Legislature. The case well illustrates the difficulties that too commonly flow from failure to take a little pains in the beginning. A reference to the Act and the Forms, and a more careful adherence to the plain directions of the latter, would have saved the parties considerable trouble, delay, and expense.

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RE MCALPINE AND LAKE ERIE AND DETROIT RIVER R.W. CO.

Feb. 8.

*Arbitration and Award—Clerical Error in Award—Motion to Refer Back—  
Railway Act of Canada.*

Motion for an order referring back to the arbitrators, to enable them to correct a clerical error, an award made under the Dominion Railway Act:—

*Held*, that if the Provincial legislation (R.S.O. 1897, ch. 62) applied, the motion was needless, the arbitrators having power (sec. 9 (c)) to correct the mistake. If that legislation were not applicable, there was no power, under the Dominion Railway Act or otherwise, to remit the award, nor to correct the error upon this motion.

AN application by the claimant, in an arbitration under the Dominion Railway Act to fix the compensation for land taken for a railway, for an order referring back the award to the arbitrators to correct a clerical error therein, viz., the substitution of "1st August, 1901" for "1st August, 1900," in giving the date from which interest on the amount of compensation was to be calculated.

The application was heard by MEREDITH, J., in the Weekly Court, on the 8th January, 1902.

*T. W. Crothers*, for the claimant, cited in support of the application *Stewart v. Beattie* (1876), 37 U.C.R. 538; *Connor v. McCormack* (1873), 23 C.P. 271; *Re Grant v. Eastwood* (1875), 22 Gr. 563.

*H. E. Rose*, for the railway company. By sec. 152 of the Railway Act, 51 Vict. ch. 29 (D.), the award is to be "final and conclusive except as hereinafter provided," and sec. 161 is the only section which makes any provision to the contrary; it provides for an appeal where the award exceeds \$400, and enacts (4) that the right of appeal shall not affect the existing law or practice in any Province as to setting aside awards. If this section were by way of appeal from or to set aside the award, the railway company would not oppose it; but it is to refer back, and there is no jurisdiction to refer back or to correct the award. There is a provision in the Ontario Arbitration Act, R.S.O. 1897, ch. 62, sec. 11, giving power to the Court to remit an award; but Provincial legislation does not apply to



this award; if it did apply, sec. 9 of the same Act would give the arbitrators themselves power to correct the award. Apart from the statute, there is no power to remit: *Re Grand Trunk R.W. Co. and Petrie* (1901), 2 O.L.R. 284; *Green v. Citizens Ins. Co.* (1890), 18 S.C.R. 338. At any rate there is no reason why interest should run from the 1st August, 1900, as the claimant had possession of the land until May, 1901.

*Crothers*, in reply. The right to interest from the date of filing the plan is established: *Re Macpherson and City of Toronto* (1895), 26 O.R. 558; *Re Birely and Toronto, Hamilton, and Buffalo R.W. Co.* (1897), 28 O.R. 468; *James v. Ontario and Quebec R.W. Co.* (1886), 12 O.R. 624. The Court has jurisdiction over awards generally: Judicature Act, R.S.O. 1897 ch. 51, sec. 26 (2).

February 8. MEREDITH, J.:—The motion is for an order referring an award back to the arbitrators, to enable them to correct a clerical error in it.

Mr. Rose's objection to the motion is well taken. If the Provincial legislation (R.S.O. 1897, ch. 62) applies, the motion is needless; the arbitrators have power (sec. 9 (c)\*) to correct the mistake. If that legislation is not applicable, there is no power to remit the award, or to correct the error upon this motion.

Except under power conferred by statute, or by the parties, the courts would not correct errors in awards, either directly or through the arbitrators. The case of *Ward v. Dean* (1832), 2 B. & Ad. 234, exemplifies the strictness of the rule. In a case of the plainest clerical error, the court would but set the award aside altogether, or else enforce it as it was; and so the defendant, preferring the latter course, was obliged to pay the plaintiff's costs in a case in which the plaintiff had wholly failed, and in which the arbitrator had intended to award costs to the defendant, but, by a mere slip, had written the plaintiff's instead of the defendant's name.

\*9. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power:—

(c) To correct in an award any clerical mistake or error arising from any accidental slip or omission.

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This rule was adhered to in a court of equity, in the much later case of *Mordue v. Palmer* (1870), L.R. 6 Ch. 22; Lord Justice James saying that, even in the state of the law as it existed when the courts had no power to rectify any mistakes in an award, it was thought a safe thing to keep the arbitrator strictly to his award, and to shut the door against the admission of evidence as to what the arbitrator intended to do or had omitted to do; that it was considered dangerous to admit anything but the written document, which, once signed, must stand. In that case, under statutory power to remit, the award was referred back to the arbitrator so that the mistake might be rectified by him.

So that, notwithstanding the circumscribed interpretation placed upon the statutory provision for remitting the matter referred to the arbitrator (see *Hodgkinson v. Fernie* (1857), 3 C.B.N.S. 189; *Dinn v. Blake* (1875), L.R. 10 C.P. 388; *McRae v. Lemay* (1890), 18 S.C.R. 280; *Green v. Citizens Ins. Co.*, *ib.* 338; and *Re Grand Trunk R.W. Co. and Petrie*, 2 O.L.R. 284) a case, such as this, might be referred back, so that the mistake might be corrected, in a case where the statute was applicable: see *Mills v. Bowyers Society* (1856), 3 K. & J. 66; *In re Dare Valley R.W. Co.* (1868), L.R. 6 Eq. 324; *In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q.B. 131; and *In re Stringer and Riley*, [1901] 1 Q.B. 105.

The question then is—assuming that Provincial legislation is not applicable:—Does the Railway Act, 51 Vict. ch. 29 (D.), authorize the re-opening of the matter? There is no contention that it otherwise permits any change in the award.

That the Parliament of Canada could, in virtue of its powers respecting railways, make such provision, and also override any Provincial legislation upon the subject, is reasonably clear: see *In re Canadian Pacific R.W. Co. and County and Township of York* (1898), 25 A.R. 65, and *Grand Trunk R.W. Co. v. City of Toronto* (1900), 32 O.R. 120.

But I am unable to find that it has authorized the remission to the arbitrators of such matters as that in question.

Under the provisions of the Railway Act, the award is to be final and conclusive, subject, however, to an appeal “whenever the award exceeds \$400,” but such right of appeal is not to

“affect the existing law or practice in any Province as to setting aside awards.”

The “setting aside” of an award is something quite different from remitting to the arbitrators the matters referred for reconsideration. The case of *Ward v. Dean* exemplifies this. The power to remit or refer back originally depended upon the agreement of the parties, and subsequently upon legislation; and has, I think, been always separately and independently provided for.

There may be cases in which setting aside the award, or an appeal against it, would not be as appropriate and convenient or sufficient a means of relief as a reference back to the arbitrator, but in this case justice would be perhaps better and more conveniently done upon an appeal, where the clerical mistake could be rectified, and, at the same time, the question whether the arbitrators ought to have awarded interest from the filing of the plan, or from the taking of actual possession only, could be determined, than by a remission to, and rectification by, the arbitrators. If the clerical error were so amended, an appeal by the railway company would no doubt follow.

I have been able to find only one case in which there was a reference back of a case of this character, but that was in accordance with an agreement between the parties requiring it: see *Demorest v. Grand Junction R.W. Co.* (1885), 10 O.R. 515.

The Railway Act does not, in my opinion, authorize the reopening of the reference; and, if the Provincial legislation applies, there is no need for reopening it: see secs. 47 and 9 (c), R.S.O. 1897, ch. 62.

The motion is, therefore, dismissed; there will be no order as to costs.

E. B. B.

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## [IN THE COURT OF APPEAL.]

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KING ET AL. V. LOW ET AL.

1901

April 26.

Nov. 14.

*Contract—Building Contract—Agreement to do Work for a Specific Sum—  
Destruction of Building before Completion.*

The defendants, who had taken a contract for the erection of a dwelling house for a fixed sum, accepted the plaintiffs' tender to do the plumbing and tin-smithing work for \$500; but before the completion of the plaintiffs' contract, though after they had done work up to \$488, the building was destroyed by fire, not happening by the fault of the plaintiffs, defendants, or the owner. The defendants had received two sums of \$1500 on account of their contract, but they denied that any portion of it was for work done by the plaintiffs.

In an action by the plaintiffs to recover the \$488, on a *quantum meruit*:—

*Held*, that where, as here, the contract is to do work for a specific sum, there can be no recovery until the work is completed, or unless the failure to do so is caused by the defendants' fault, and this applies as well to original as to sub-contracts, and as the plaintiffs admitted the non-completion by suing on a *quantum meruit*, and there was nothing to shew any fault on the defendants' part, there could be no recovery.

Judgment of Boyd, C., reversed.

*Appleby v. Myers*, (1867), L.R. 2 C.P. 660, followed.

THIS was an appeal to the Court of Appeal in an action tried before BOYD, C., and a jury, at Brockville, on the 12th April, 1901.

*J. A. Hutcheson*, and *A. A. Fisher*, for the plaintiffs.

*R. G. Code*, for the defendants.

George F. Benson, intending to have a house built for himself upon an island in the River St. Lawrence, accepted the following offer for the erection of the same, made by the defendants, and dated December 12th, 1899: "We hereby make offer for the erection of a house on the St. Lawrence for Geo. F. Benson, as per plans and specifications by Robert Findlay, architect, Montreal, for the sum of four thousand four hundred and fifty (\$4,450) dollars. P.S.—For the suggested changes, we would prefer the plan to be made shewing the changes first."

And thereupon the defendants accepted the following offer of the plaintiffs, dated the 2nd May, 1900, to do that part of the work agreed to be done by the defendants referred to therein: "We hereby offer to do the plumbing and tin-smith work of Mr. Benson's summer house for the sum of five hundred (\$500) dollars, and for an 1 $\frac{1}{4}$ " feed and 2" overflow pipe from tank to cellar the additional sum of \$35 (thirty-five dollars)."



The defendants commenced the work about the 15th of April, and the plaintiffs commenced their work sometime in May, and on the 20th June, before the work contracted to be done by the plaintiffs was completed, the house in course of erection was destroyed by fire without the fault of the plaintiffs, defendants, or of Benson.

The plaintiffs claimed that the value of the work done by them and of the materials supplied by them was at the time of the fire the sum of \$488; and this was the amount they claimed to recover in the action as upon a *quantum meruit*.

The defendants received from Benson, on account of their contract, the sum of \$1,500 on the 15th May, and \$1,500 on or about the 13th June; but it was denied that these sums were received in respect of any part of the work contracted to be done by the plaintiffs.

The learned Chancellor charged the jury to find merely whether the plaintiffs were entitled to anything, and, if so, to how much, saying that he would dispose of the legal questions afterwards; and the jury were not asked to find whether the non-completion of the work by the plaintiffs was caused by the delay of the defendants, nor was it referred to in the charge.

The jury found a verdict for the plaintiffs for the full amount of the claim, \$488.

The learned Chancellor subsequently delivered the following judgment:—

April 26. BOYD, C.:—In contracts for work, labour and materials, the general rule is (in the absence of anything to shew a contrary intention), that the worker is to be paid for the work and the materials he has done and provided, though the whole work is not complete. This is, *primâ facie*, the contract between those who enter into contracts for doing work and supplying materials; but there may be special stipulations to complete the whole, and to be paid when the whole is complete and not till then, and, in that case, there can be no recovery of the price before the complete performance of the contract: *Appleby v. Myers* (1867), L.R. 2 C.P. 660. That is the law as between the owner of the property and the workman or contractor; here the contract was by way of sub-contract for part

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of the work entered into between the contractors for the whole house, the defendants, and the plaintiffs who were to do the tinsmith and plumbing work in the house.

The sub-contract would not be affected by the conditions and special terms as to certificate, etc., existing between the owner and the chief contractor: *Petrie v. Hunter* (1882), 2 O.R. 233, and *Lewis v. Hoare* (1881), 44 L.T.N.S. 66; but otherwise the contractor is in a position somewhat analogous to that of owner or employer towards his sub-contractor, so that the point to be ascertained is whether the engagement to do this part of the work is so entire and undivided as to call for completion of all the particular work before the right to ask for payment arises.

Some delay arose in completing some part of the plaintiffs' work by the backwardness of the contractors' men, and there was before the fire substantial completion of the whole to within about \$12, as found by the jury on disputed evidence. Applying *Appleby v. Myers*, L.R. 2 C.P. at p. 661, the reason for non-completion before the time is attributable to the defendants' default, and that forms one ground of exception from the main doctrine of the law.

As to substantial completion, see *Lowther v. Heaver* (1889), 41 Ch. D. 249, at p. 262, not cited in *Sherlock v. Powell* (1889), 26 A.R. 407. It has also been held that the rule that unless the contract for the erection of a building provides against contingencies that may happen during the progress of the work, the loss, if any occurs, will fall upon him who has agreed to do any given work that is possible to be done, because his agreement is to that effect, and he is not excused from performance by reason of its sudden destruction, can have no application to a sub-contractor who has simply undertaken to do a distinct portion of the work: *Clark v. Bruce* (1876), 82 Ill. 515. See also a case cited by the plaintiffs very much in point: *Hubbard v. Walker*, 13 U.C.R. 205.

Everything here concurs in the result that the plaintiffs should recover the amount awarded by the jury, \$488.

The contract was in the form of a letter from the plaintiffs to the defendants, offering to do the work of plumbing and tinsmithing on the house for \$500. No terms were otherwise specified, and nothing said as to the time of payment.

The evidence shews substantial completion (to within \$12), and the omission to do the greater part of the work arose from delays to be charged against the contractors rather than the plaintiffs.

Judgment will, therefore, be entered for \$488, and costs of action to be paid by the defendants to the plaintiffs.

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From this judgment the defendants appealed to the Court of Appeal, and the appeal was argued on the 7th of November 1901, before ARMOUR, C.J.O., MACLENNAN, MOSS, and LISTER, J.J.A.

*J. R. Code*, for the appellant. The contract was an entire contract, viz., for a bulk sum payable on the completion of the work, and until the work was completed there could be no recovery. The case of *Appleby v. Myers* (1866), L.R. 1 C.P., 615 (1867), L.R. 2 C.P. 625, is expressly in point. There the property had been destroyed by fire before the completion of the contract, and it was held that there could be no recovery. The same principle is laid down in *Hudson on Building Contracts*, 2nd ed., 181-2. The plaintiff has admitted by his pleadings that the work had not been completed, for he has not sued for the full contract price, but on a *quantum meruit* for the amount of the work actually done. The learned Chancellor seemed to think that there was an exception to the rule laid down in *Appleby v. Myers*, namely, that it was sufficient to shew that the work had been substantially performed, and that this Court would have so held in *Sherlock v. Powell*, 26 A.R. 407, had the case of *Lowther v. Heaver*, 41 Ch. Div. 248, been brought to its attention; but that case turned on a question of pleading, and in no way interferes with the principle laid down in *Appleby v. Myers*. The case of *Sherlock v. Powell* is, therefore, an express decision of this Court against the contention that substantial performance is sufficient. See also *The Madras*, [1898] P.D. 90; *Forman & Co. v. Ship Liddesdale*, [1900] A.C. 190; *Hudson on Building Contracts*, 2nd ed., p. 774. Then as to the question of delay. There must be such delay on the defendant's part as would justify the plaintiff in rescinding the contract. There was delay here on both sides, such as is inevitable in building con-

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tracts of this kind; but no such delay as would justify the plaintiff in treating the contract as at an end.

*J. A. Hutcheson* for the respondents. There is a distinction between a default in completing the work under a contract and the inability to do so through no fault of the person undertaking to do the work: Addison on Contracts, 9th ed., p. 806. The contract was substantially performed, as the learned Judge has decided, and this takes the case out of the general rule laid down in *Appleby v. Myers*, L.R. 2 C.P. 625. The learned Chancellor finds that there is another exception to the general rule, namely, where, as here, the work would have been completed but for the defendant's delay. The defendant cannot set up his own default to defeat the plaintiff's recovery. *Lowther v. Heather*, 41 Ch. D. 248, correctly lays down the law, and, as pointed out by the learned Chancellor, this case was not brought to the attention of the Court in *Sherlock v. Powell*, 26 A.R. 407. The case of *Hubbard v. Walker* (1856), 13 U.C.R. 205 is expressly in the plaintiff's favour. There it was held that the destruction of the building by fire would not defeat the plaintiff's claim for the work he had done. There is also the distinction between the case of the original contractor and a sub-contractor, and properly so, for the original contractor may rebuild and so recover under his contract, while, unless the original contractor rebuilds, the sub-contractor is unable to do anything, and is therefore at the mercy of the contractor: *McKenna v. McNamee* (1888), 15 S.C.R. 311, at p. 321.

November 14. ARMOUR, C.J.O.:—In my opinion the judgment must be reversed.

In *Appleby v. Myers*, L.R. 2 C.P. 651, it was said by Blackburn, J., delivering the judgment of the Court, "That, on the principles of English law laid down in *Cutter v. Powell* (1795), 6 T.R. 320; *Jesse v. Roy* (1834), 1 C. M. & R. 316; *Munro v. Butt* (1858), 8 E. & B. 738; *Sinclair v. Bowles* (1829), 9 B. & C. 92, and other cases, the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shewn that it was the defendants' fault that the work was incomplete, or that there



is something to justify the conclusion that the parties have entered into a new contract."

And what is here meant by "the defendants' fault" is such fault as would entitle the plaintiffs to rescind the contract and sue for a *quantum meruit*.

In this case the plaintiffs contracted to do an entire work for a specific sum; and it was not shewn that it was the defendants' fault that the work was incomplete, and there was nothing shewn to justify the conclusion that the parties had entered into a new contract.

There was some delay on the defendants' part in doing the work required to be done by them before the plaintiffs could complete their work; but during this delay the plaintiffs were not idle, but were engaged in doing other work to the house not comprised in their contract; there was also some delay on the plaintiffs' part in doing the work required to be done by them before the defendants could do a part of their work. I do not, however, think that the evidence shews any delay occasioned by either party to the other, except such usual delay as might be expected under similar circumstances. And I do not think that there was any such delay on the part of the defendants as would have justified the plaintiffs in rescinding the contract had they essayed to do so; which, however, they never did.

The plaintiffs' contract must, therefore, be held to have been still in force and binding upon the defendants at the time of the fire; and I think, following what is said in *Appleby v. Myers*, that the house having been destroyed without fault of the plaintiffs, defendants, or Benson, it was a misfortune equally affecting both plaintiffs and defendants, and excusing each from further performance of the contract, but giving a cause of action to neither.

I see no reason why the law laid down in *Appleby v. Myers* is not equally applicable to the contract of sub-contractors, such as the plaintiffs were, as to the contract of contractors, such as the defendants were; and I do not think that the fact that Benson had made advances to the defendants on account of their contract, which he was not bound by the contract to do, had any effect upon the contractual relation between the plaintiffs and the defendants.

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The decisions in the United States differ from those in England, as may be seen in the decision of *Butterfield v. Byron*, (1891), 153 Mass. 517; but we must be governed by the decisions in England and not by those in the United States.

The plaintiffs did not bring this action for the contract price, alleging that they had substantially completed their contract; but admitted that they had not completed their contract, and brought it for the value of the work done by them.

I refer to *The Madras*, [1898] P.D. 90; *Forman & Co. v. Ship Liddesdale*, [1900] A.C. 190; *Sherlock v. Powell*, 26 A.R. 407, the decision in which is not at all affected by the decision in *Lowther v. Heaver*, 41 Ch. D. 248, the question there being not whether the roofing in of the buildings was complete, but whether they were roofed in within the meaning of the agreement between the parties.

I must add that the work mentioned in the contract for which the additional sum of thirty-five dollars was to be paid was not in question in this suit, it having been completed and paid for, but only the work mentioned in the contract for which the sum of five hundred dollars was to be paid.

The appeal must, in my opinion, be allowed with costs, and the action dismissed with costs.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

G. F. H.

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## [DIVISIONAL COURT.]

## LEISHMAN V. GARLAND.

D. C.

1902

Jan. 8.

*Appeal—County Courts—Appeal to Divisional Court—When Authorized—R.S.O. 1897, ch. 55, sec. 51, sub-secs. 1, 2, 3 and 5.*

Where from a judgment pronounced by a junior Judge in a county court case, tried before him without a jury, an appeal to set aside such judgment and to enter judgment for the defendants, or, in the alternative, a new trial, was made to the senior judge, and on such appeal the judgment was set aside and judgment entered for the defendants dismissing the action, an appeal lies to the Divisional Court by the unsuccessful party to such appeal, and the fact that a new trial in the alternative was asked for is immaterial.

The sub-secs. of sec. 51 of the County Courts Act, R.S.O. 1897, ch. 55, applicable are sub-secs. 1, 2 and 5, and not sub-sec. 3.

THIS was an appeal by the plaintiff to the Divisional Court from the judgment or order of the senior Judge of the county court of the county of York, dated the 21st of May, 1901, setting aside the judgment of the second junior Judge of the same court in favour of the appellant pronounced on the 31st of the previous January after the trial before him without a jury.

On September 6th, 1901, before a Divisional Court, composed of MEREDITH, C.J., and LOUNT, J., the appeal was argued.

*B. R. Davis*, for the appellant.

*W. R. Riddell*, K.C., for the respondent.

January 8. The judgment of the Court was delivered by MEREDITH, C.J.:—The action is for damages for wrongful dismissal of the appellant from his employment as a traveller for the respondents under the terms of an agreement between them, dated the 1st March, 1899, to recover \$47.34, a balance of commission which the appellant claimed to be due to him by the respondents on sales made by him for them in 1898; \$7, a further sum alleged to be due for commission; \$22.50 balance of salary under the agreement of 1st March, 1899, to 28th February, 1900, and \$12.50 salary under the same agreement, 3rd March, 1900.

The respondents by their statement of defence deny all the allegations of the statement of claim except the merely formal

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ones; set up that the appellant did not continue in the employment of the respondents until the 3rd March, 1900, but absented himself from their business without their knowledge and consent, and left their employment on the 28th February, 1900; allege various acts of misconduct and neglect of duty on the part of the appellant, and say that his salary has been overpaid. They further allege that by an agreement of the 18th March, 1898, the appellant entered into their employment as traveller at the salary and on the terms mentioned in the agreement, and that during his employment he overdrew his account to a large amount, the amount of the overdraft being alleged to be \$630.33, which sum the respondents allege to be owing to them by the appellant, and claim to recover from him by way of counter-claim.

To the respondents' pleading the appellant filed a reply and joinder of issue, and the action went down to trial on these pleadings.

At the trial the appellant abandoned the claims of \$47.34 and \$12.50 and failed as to the claim for \$7, but succeeded on his claim for wrongful dismissal, the damages on that branch of the case being assessed at \$125. He succeeded also as to the claim of \$22.50 for balance of salary, and on the counter-claim, and judgment was accordingly directed to be entered for him against the respondents on the claim for \$147.50 with costs, and dismissing the counterclaim with costs.

The respondents moved before the senior Judge by way of appeal from the judgment pronounced at the trial, and to enter judgment for them upon the claim and counter-claim, or in the alternative for a new trial or for such further or other order as might seem meet, with the result that the judgment or order from which the appellant now appeals was pronounced by the learned senior Judge.

Upon the appeal being opened, Mr. Riddell took the preliminary objection that an appeal did not lie to a Divisional Court from an order directing a new trial, and the appeal was argued subject to that objection.



The right of the appellant to appeal depends upon sec. 51 of the County Courts Act, R.S.O. 1897, ch. 55; and unless a right to appeal is given by that section, it may be conceded that an appeal does not lie.

It was argued by Mr. Riddell that the sub-section to be applied was sub-sec. 3, and that according to the decided cases there is no appeal from an order for a new trial made upon a motion under that sub-section: *Brown v. Carpenter* (1896), 27 O.R. 412; *Irvine v. Sparks* (1900), 31 O.R. 603; and he contended that the respondents' motion in the Court below was in effect two motions, one under sub-sec. 2 which had failed, and the other under sub-sec. 3, which had succeeded.

I am unable to agree with this contention. The motion was, in my opinion, under sub-sec. 2, to set aside the judgment and to enter judgment for the respondents, and none the less so, I think, because in the alternative a new trial was moved for, and from a judgment pronounced upon such a motion which is successful the opposite party is by sub-sec. 5 entitled to appeal to the High Court. If the Legislature had intended otherwise one would have expected to find the provision of sec. 4 made applicable to all cases instead of its being, as it is, confined to jury cases.

It is by no means clear that sub-sec. 3 applies to a motion for a new trial where the ground on which the party moves is that upon the whole case it is one in which in its discretion the Court should direct a new trial, and that it is not to be taken to be confined to cases where the ground is something *ejusdem generis* with that mentioned in the sub-section (the discovery of new evidence).

The scheme of the section appears to me to be this:

There is to be an appeal at the option of the unsuccessful party, both in jury and non-jury cases, either to a Divisional Court or to the county court, except that in jury cases if a new trial is moved for either alone or combined with or as an alternative for any other relief, the motion must be made to the county court, and no further appeal is given to either party.

A motion for a new trial on the ground of discovery of new evidence or the like must be made, both in jury and non-jury

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cases, to the county court, and no further appeal is given to either party.

Where a party having the right to appeal either to a Divisional Court or to a county court, elects to appeal to the latter Court he has no further right of appeal, but the opposite party has the right to appeal to the High Court.

*Brown v. Carpenter* was a motion for a new trial on the ground of the discovery of fresh evidence, and in *Irvine v. Sparks* the trial was by a jury, and neither case, therefore, assists the respondents.

In my opinion, as I have said, not sub-sec. 3 but sub-secs. 1, 2 and 5 are the governing sections in this case, and the objection therefore fails.

To proceed now to the merits.

[The learned Chief Justice, having first dealt with the claim, and stated his reasons for thinking that the judgment at the trial as to it was right, then discussed the evidence bearing on the counter-claim, and proceeded]:

With great respect, therefore, I am of opinion that the learned senior Judge erred in setting aside the judgment in favour of the appellant on the counter-claim and directing a new trial as to it, and I would allow the appeal, reverse the judgment or order appealed from, and restore the judgment pronounced at the trial, the whole with costs here and below.

G. F. H.

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[IN CHAMBERS.]

## LANGLEY V. LAW SOCIETY OF UPPER CANADA.

1902

Feb. 12.

*Parties—Addition of—Separate Causes of Action—Joinder—Rules 185, 186, 187, 192—Third Party Notice—Indemnity.*

The plaintiff sued to recover the amount of a book debt assigned to him. The defendants admitted nothing, and pleaded payment and set-off:—

*Held*, that the plaintiff was properly allowed to add as a party defendant the assignor of the alleged debt, and to make a claim against him, in the event of the original defendants succeeding in their defence, basing such claim upon an alleged warranty or a total failure of consideration.

Rules 185, 186, 187, 192, discussed.

*Tate v. Natural Gas and Oil Co.* (1898), 18 P.R. 82, and *Evans v. Jaffray* (1901), 1 O.L.R. 614, followed.

*Smurthwaite v. Hannay*, [1894] A.C. 494, *Thompson v. London County Council*, [1899] 1 Q.B. 840, and *Quigley v. Waterloo Manufacturing Co.* (1901), 1 O.L.R. 606, distinguished.

*Held*, also, that the added defendant was properly allowed to give a third party notice to a bank, upon his allegation that he acted only as the bank's agent in assigning the debt.

*Confederation Life Association v. Labatt* (1898), 18 P.R. 266, followed.

AN appeal by the defendants from an order of the Master in Chambers allowing the plaintiff to add one E. R. C. Clarkson as a defendant and to make a claim against him; and also allowing Clarkson to serve a third party notice on the Bank of Hamilton.

The action was brought to recover an amount alleged to be due for work done by a firm of Rowsell & Hutchison for the defendants. That firm made a general assignment to Clarkson for the benefit of creditors; and Clarkson sold and assigned the assets of the firm, including the claim against these defendants, to the Publishers' Syndicate, Limited; and this action was brought by the plaintiff as liquidator of the Publishers' Syndicate. The claim which the plaintiff sought to make against Clarkson was an alternative one, based upon an alleged warranty or a total failure of consideration, in the event of the original defendants succeeding in their defence. Clarkson filed an affidavit in answer to the motion in which it was stated that the sale by him to the Publishers' Syndicate was, as regards the claim in question, made by him as agent for and on behalf of the Bank of Hamilton, he accounting to the bank for the proceeds.

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The appeal was heard by MEREDITH, J., in Chambers, on the 10th January, 1902.

*Hamilton Cassels*, for the defendants, contended that the claims against the Law Society and Clarkson respectively were separate, and could not be joined in the same action, citing *Smurthwaite v. Hannay*, [1894] A.C. 494; *Sadler v. Great Western R. W. Co.*, [1895] 2 Q.B. 688; *S.C.*, [1896] A.C. 450; *Gower v. Couldridge*, [1898] 1 Q.B. 348; *Stroud v. Lawson*, [1898] 2 Q.B. 44; *Thompson v. London County Council*, [1899] 1 Q.B. 840; *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q.B. 504; *Mooney v. Joyce* (1896), 17 P.R. 241; *Faulds v. Faulds* (1897), *ib.* 480.

*George Bell*, for Clarkson. What Clarkson sold to the defendants was the benefit of the work which had been done. No fraud is charged; there was no warranty; and there is no right to indemnity from Clarkson. The plaintiff's right, if any, is against the bank. Such right ought not to be tried in an action against Clarkson: Evans on Principal and Agent, 2nd ed., p. 368, and cases there cited. If added as a defendant, however, Clarkson is entitled to look to the bank to indemnify him.

*C. Duff Scott*, for the plaintiff. Rules 186, 187, 192, are wide enough to support the Master's order. The plaintiff, being in doubt as to which of two is liable, is entitled to add Clarkson, under Rule 192. I refer to *Child v. Stenning* (1877), 5 Ch. D. 695; *Tate v. Natural Gas and Oil Co.* (1888), 17 P.R. 82; *Edwards v. Lowther* (1875), 45 L.J. C.P. 417, 24 W.R. 434; *Bagot v. Easton* (1877), 7 Ch. D. 1; *Noyes v. Young* (1894), 16 P.R. 254. *Smurthwaite v. Hannay*, [1894] A.C. 494, was a case of misjoinder of plaintiffs, not of defendants, and Rule 185 was amended to meet that case. *Sadler v. Great Western R.W. Co.*, [1896] A.C. 450, and *Gower v. Couldridge*, [1898] 1 Q.B. 348, and cases of separate tort-feasors, and do not apply. This action arises out of contract, and the evidence relating to both claims will be much the same.

February 12. MEREDITH, J.:—The plaintiff alleges: that he is liquidator of The Publishers' Syndicate, Limited; and that that company were the assignees of a debt payable by the



defendants the Law Society of Upper Canada, to a firm of Rowsell & Hutchison, for work done and materials provided by that firm for those defendants, at their request; and the action is brought to enforce that claim.

These defendants admit nothing, and plead payment and set-off.

The plaintiff sought to add the assignor, to The Publishers' Syndicate, Limited, of the alleged debt, as a party defendant, and to make a claim over against him, in the event of the other defendants succeeding in their defence of the action, basing such claim upon an alleged warranty or a total failure of consideration.

The Master in Chambers allowed the assignor to be so added, and the claim over to be so made; and also allowed the assignor to give a third party notice to the Bank of Hamilton, upon his claim to indemnity from them, in case of the plaintiff succeeding against him, he claiming to have acted only as their agent in assigning the debt.

The defendants the Law Society of Upper Canada now appeal against the Master's order, and the questions for consideration are, whether the Master had power to make such an order, and, if so, whether he ought to have made it.

The latter question must at once be answered in the affirmative. If he had the power to make it, he ought to have made it.

The first step in the trial will be the determination of the question whether the defendants the Law Society of Upper Canada are indebted as alleged. In that question all parties are directly concerned; it is quite as much in the interests of the added defendant, and of the third parties, as of the plaintiff (probably more so) to establish such indebtedness. It is also in the interests of justice, and its due administration, that one trial should determine that question between all the parties: it could not be satisfactory to have the plaintiff fail in an action against the alleged debtors only, on the ground that they never were indebted; and again to fail, upon the same evidence, in another action against the added defendant, on the ground that the alleged debtors were indebted; and that is a possibility if there be two trials; and, besides that, there would be the

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additional inconvenience, delay, and expense of the two trials. Again, the defendants, the Law Society of Upper Canada, are directly concerned with each of the other parties in some of the matters in issue: they have not admitted, but in effect have denied, that the claim of Rowsell & Hutchison has been validly transferred to the plaintiff. Every one who incurs an assignable debt is concerned in every assignment of that debt. It cannot be doubted that all the parties, other than the alleged debtors, might rightly have been joined as plaintiffs, on allegations of the various assignments or transfers of the alleged indebtedness, and that their validity was questioned. Even before the amendment of Con. Rule 185, a good claim could have been made in such a case to relief in the alternative.

And, lastly, there can be no wrong, nor need there, indeed, be any inconvenience, to the alleged debtors, in a trial of the action with the added parties. The first and main question will be:—Are the defendants, the Law Society of Upper Canada, indebted as alleged? However that question may be determined, it will end the action so far as these defendants are concerned; the trial so far will be substantially the same as if the action had been continued against them alone. They will not be concerned in the further proceedings if they succeed upon that question; the action will, in the ordinary course, be dismissed as to them; whilst, if they fail upon that question, in all probability there will be no other question to try; and the trial Judge, in his power over costs, can afford these defendants, in any event, as much relief as to costs as if they had been sued alone.

The order ought to be upheld, if the practice warrants it. Does it?

Con. Rule 186 provides that, "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative . . ."

Con. Rule 192 provides that, "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, in order that the question as to which, if any, of them is liable, and to what extent, may be determined as between all parties."

And Con. Rule 187 provides that, "It shall not be necessary

that every defendant to an action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein . . . ."

These Rules, read together, seem to me to be broad enough to cover this case.

Here the plaintiff is in doubt as to the person from whom he is entitled to redress; that doubt is caused by the denial of indebtedness pleaded. The added defendant asserts it, the original defendants deny it. All parties are "interested" in the first and main question, and it is not necessary that they should be interested in the question of warranty or of failure of consideration, and these questions are also questions which may never need to be tried.

But it was argued that the cases are opposed to this opinion.

I do not, however, find them to be so: on the contrary, I think it is in accord with these most in point of higher authority—not referred to in the argument.

If the Master's order cannot stand, I am unable to perceive how the case of *Tate v. Natural Gas and Oil Co.*, 18 P.R. 82, can have been well decided. It is the judgment of a Divisional Court of this High Court, affirmed by the Court of Appeal. It seems to me to give even a broader effect to the Rules than is necessary to sustain this order.

And it is, I think, supported by such cases as *Honduras R. W. Co. v. Tucker* (1877), 2 Ex. D. 301; *Bennetts v. McIlwraith*, [1896] 2 Q.B. 464; *Child v. Stenning*, 5 Ch. D. 695; and *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q.B. 504.

It is not necessary that I should discuss cases of less authority than these, which (if there be any) conflict in principle with these.

And of those of equal or greater authority it is needful to refer to two only.

Of *Smurthwaite v. Hannay*, [1894] A.C. 494, it may perhaps be enough to say that that was a case of misjoinder of plaintiffs, a case to which Con. Rules 187 and 192 were inapplicable: but it was also a case in which it was held that the claim of each plaintiff was upon a contract separate and distinct from that of each of the others. There was no

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connecting link between any of the claims, though they were all against the same defendants, and arose out of, mainly, the same circumstances.

The case of *Thompson v. London County Council*, [1899] 1 Q.B. 840, is the strongest for the appellants, but that was held to be a case of joining two separate and distinct actions, for different wrongs, against different defendants. And in that case the case of *Bennetts v. McIlwraith* was not found fault with, but was spoken of with approval.

The effect of the *Smurthwaite* and *Thompson* cases is lucidly exemplified by Romer, L.J., in the *Frankenburg* case.

Neither the *Smurthwaite* nor the *Thompson* case is in fact or in principle like this case, but the case of *Bennetts v. McIlwraith* in a measure is.

Of the latest cases in this Court *Quigley v. Waterloo Manufacturing Co.* (1901), 1 O.L.R. 606, was governed by the *Thompson* case. It was the case of an attempt to add an alleged wrong-doer as a defendant in an action upon a contract, without any allegation of any connection whatever between the wrong alleged to have been committed by him and the contract sued upon. If the action had been brought against the wrong-doer, and relief over had been sought against the contractor, a different case would have been presented, and the result might have been different. In this case relief over is sought, and, in addition, there is the connection between all the parties which the transfers of the alleged debt made. All claims are upon contract and in respect of the same subject-matter.

And *Evans v. Jaffray* (1901), 1 O.L.R. 614, is a strong case of allowing joinder of defendants and causes of action: and one which is more than merely broad enough to support the order here in question.

The contention that the practice as to joinder of defendants stands in the same position as that of joinder of plaintiffs did before the amendment of Con. Rule 185, because Rule 186 was not also amended, seems to me quite fallacious. It leaves out of consideration altogether the important Rules 187 and 192.

It would be a curious anomaly if several plaintiffs might sue one defendant, whilst one plaintiff might not sue several defendants, under the like circumstances.



The reason Rule 186 was not changed to correspond with the change in Rule 185 was, I have no doubt, that the combined effect of Rules 186, 192, and 187 was at least as wide as Rule 185, in its present form, is: and, in its present form, it is quite wide enough to cover this case, which is one arising out of the same series of transactions, and in which there is some common question of law or fact.

Mr. Bell's contention that the assignor ought not to have been made a party, because, as he contends, the assignor was acting merely as agent of the Bank of Hamilton, raises a question of fact proper for consideration at the trial, not upon this motion: see *Tate v. Natural Gas and Oil Co.*, 18 P.R. 82.

The case of *Confederation Life Association v. Labatt* (1898), 18 P.R. 266, is authority for the third party notice.

The Master's ruling is affirmed; and the appeal will be dismissed; costs in the action to the plaintiff only.

E. B. B.

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SCOTT v. MEWBERRY.

Dec. 4.

*Evidence—Particulars.*

Where in an action by a clerk against his former employer, an hotelkeeper, for an alleged assault and for arrears of wages, the defence was that the plaintiff, contrary to his duty, was disrespectful and uncivil to several of the guests, whereby they left and refused to further patronize the hotel, the plaintiff was held entitled to an order for particulars, giving the names of such guests.

THIS was a motion by the plaintiff for an order for particulars of certain statements made by the defendant in his statement of defence.

The motion was argued before Mr. Winchester, the Master in Chambers, on the 30th of November, 1901.

*J. R. Roaf*, for the motion.

*D. Urquhart*, for the defendant.

December 4. THE MASTER IN CHAMBERS:—An action brought by a former clerk of the defendant for an alleged assault and for arrears of wages.

The defendant in the third paragraph of the statement of defence alleges that it was the duty of the plaintiff as clerk respectfully and civilly to answer all reasonable enquiries of and to give all necessary information to guests of the defendant's hotel; and the defendant says that the plaintiff, contrary to his said duty, was disrespectful and uncivil to several of the guests at the defendant's hotel by reason of which such guests left the defendant's hotel and refused to further patronize the defendant's hotel.

The plaintiff asks for an order for particulars of this paragraph, and defendant objects to give the names of the persons to whom the plaintiff is alleged to have been disrespectful and uncivil, under the authority of *Temperton v. Russell*, [1891] 1 Q.B. 435, 715. In the present case the name of the person is a relevant fact in the case and therefore under the authority of *Marriott v. Chamberlain* (1886), 17 Q.B.D. 154,

the defendant is bound to disclose such name. Order for particulars will therefore include the names of the guests referred to in the defence. Costs in the cause.

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V.

THE MUTUAL RESERVE LIFE INSURANCE COMPANY,  
AND TWO OTHER CASES.

1901

Dec. 14.

*Trial—Notice of Trial—Service of—Letter Wrongly Addressed—Ratification.*

On the day prior to the last day for serving notice of trial, the plaintiff's solicitor, who lived in a county town, drew up a notice of trial, and copies of same, which he directed to be forwarded to his Toronto agents, with instructions to serve and return with admission of service; but by a mistake in the office, the envelope was addressed to the defendants' solicitors in Toronto, and reached their office on the following morning, but did not come to the notice of the member of the firm who had charge of the defence therein, until after four o'clock, when on discovering that the letter was not addressed to his firm, he returned it with the notices to his St. Thomas agents, with instructions to return it to the plaintiff's solicitors, which was done:—

*Held*, that what was done did not constitute valid service of the notices on the defendants' solicitors; nor had the defendants' solicitors done anything to ratify such service.

THIS was an appeal by the defendant company from an order of the Master in Chambers, dated the 16th November, 1901, dismissing their application to set aside as irregular the entry of these actions for trial at the non-jury sittings at St. Thomas on the 18th of the same month, and postponing the trials on the term that the defendant company should proceed to trial at the ensuing non-jury sittings at Woodstock.

The appeal was argued before MEREDITH, C.J.C.P., in Chambers, on the 29th day of November, 1901.

The facts appear in the judgment.

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INS. CO.*Shirley Denison*, for the appellant.*S. Alfred Jones*, for the respondents.

December 14. MEREDITH, C.J.:—The contention of the appellant is that the entry was irregular and improper because, as is alleged, notice of trial had not been given.

The facts upon which the contest has arisen are the following : The last day for giving notice of trial was the 8th of November. On the previous day the respondents' solicitor, who resides at St. Thomas, prepared a notice of trial and copy for service in each case, and wrote a letter addressed to his Toronto agents instructing them to serve the notices "and return with admission"; by a mistake in the office of the solicitor the envelope in which the notices and copies and the letter were enclosed was addressed to the appellant's solicitors who reside in Toronto. The envelope with its contents was deposited in the post-office at St. Thomas on the same day and reached the office of the appellant's solicitors at 8.50 of the morning of the 8th of November. The letter was not brought to the attention of the member of the firm who are solicitors for the appellant having the conduct of the actions until after four o'clock of that day, and after his attention had been called to it, on discovering that the letter was not addressed to his firm, he forwarded it and the notices of trial and copies to the St. Thomas agents of his firm with instructions to return them to the respondents' solicitor, which was done.

The learned Master was of opinion that the effect of what was thus done was that notice of trial in each of the cases was given to the appellant's solicitors on the 8th November, and that the entry for trial was therefore properly made.

With that opinion I am unable to agree.

I do not understand how it can be said that a notice which comes from the hand of one person to that of another, upon whom it was intended to serve it by other means, by a mistake such as occurred in these cases, and without any intention that the act done should constitute service, can be held to be a service of the notice upon the person into whose hand it thus comes.



Had the respondents' solicitor changed his mind as to taking the cases down to trial and decided not to do so, I do not see on what principle it would have been open to the appellant's solicitors to insist that notice of trial had been served on them so as to bind the respondents to go to trial pursuant to the notice. It would, as it seems to me, be a sufficient answer for the latter to say, there was no intention that the notice should go to the appellant's solicitors directly or to effect service in that way, and that the notice when received by them was not received as a notice served on them but as the property of the respondents' solicitors come to the hands of the appellant's solicitors by mistake, which it was their duty to return; and if this would have been the position of matters as affecting the respondents it, as I think, necessarily follows that the appellants are entitled to take the position which they have taken, that notice of trial has not been given.

It may be urged that the act of the solicitor's clerk in sending the notices directly to the appellant's solicitor, though unauthorized, might be and was ratified by the respondents' solicitor, but there are, I think, at least two answers to that contention: first, the clerk in addressing the envelope in which the notices were contained to the appellant's solicitors and forwarding the envelope and its contents to them through the post, did not intend that what was done should be, or should be understood by the appellant's solicitors to be, service of the notice upon them; and secondly, there can be no ratification or adoption where the act sought to be ratified or adopted has not been done or assumed to be done on behalf of another.

I have to deal with legal rights and not with matters of mere ethics, and whatever might have been the ethical duty of the appellant's solicitors when they ascertained the mistake that had been made (as to which I say nothing), there was, in my opinion, no legal duty resting upon them either to enable the solicitors to get rid of the effect of the mistake that had been made by accepting service, or to send the notices and letter received to the persons for whom they were intended, with an explanation of the mistake, in time to enable them to do what their principal intended they should do—serve the notices on the 8th of November.

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Having come to this conclusion, it follows that in my opinion the appeal should be allowed, the order of the learned Master in Chambers be discharged, and instead thereof an order made setting aside the entry of the action for trial and all subsequent proceedings had thereon. The costs of the motion and of the appeal will be costs in the cause to the successful party.

G. F. H.

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[IN CHAMBERS.]

RE MCKAY v. TALBOT.

1901  
 Dec. 18.

*Division Courts—Motion for Immediate Judgment—Service with Summons—  
 Regularity of—Computation of Time—Holidays.*

A special summons issued out of a division court was served on the 8th of November, returnable on the 12th of November, and with it was served a notice of motion for immediate judgment, also returnable on the 12th:—

*Held*, that the notice was properly served, for there is nothing in sec. 116 of the Division Courts Act, R.S.O. 1897, ch. 60, which requires that before such notice is given the time for the filing of a dispute notice should have first expired.

Con. Rule 343, whereby holidays are excluded from computation where a period of less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, does not apply to division courts.

Prohibition refused.

THIS was an application by the defendants in an action brought against them by the respondent in the first division court in the district of Algoma, for an order prohibiting further proceedings in the action.

The motion was argued before MEREDITH, C.J.C.P., in Chambers, on November 25th, 1901. The facts appear in the judgment.

*G. C. Campbell*, for the applicant.

*J. H. Moss*, for the respondent.

December 18. MEREDITH, C.J.:—The question for decision arises on the provisions of sec. 116 of the Division Courts Act, R.S.O. 1897, ch. 60.

The summons was a special one, and was issued on the 6th November, 1901, and served on the defendants on Friday, the 8th of the same month, and with the summons was served a notice of motion for immediate judgment, returnable on the following Tuesday (12th).

On the return day of the motion, the defendants' solicitor attended before the junior Judge of the district and took the objection that the motion should not, as he contended, have been made returnable before the expiry of the time allowed for filing a dispute notice. The learned junior Judge thereupon adjourned the hearing of the motion until the following day, when judgment was given overruling the objection. The defendants' solicitor being present, then applied for a further adjournment to enable him to obtain material on which to oppose the motion, but this being refused, he, without prejudice, as he stated, to the objection which he had taken, filed an affidavit which he had obtained in answer to the motion, which was then argued, with the result that the order for immediate judgment was granted, and thereupon the present motion was launched.

Upon the argument before me, counsel for the defendants renewed and relied upon the objection taken in the division court, and a further objection, not raised there, that two clear days' notice of the motion, as required by sub-sec. 2 of sec. 116 of R.S.O. 1897, ch. 60, had not been given, as he contended, because the 9th November was the King's birthday and the 10th a Sunday, and argued that on both grounds the learned Judge had no jurisdiction to make an order for immediate judgment.

I see nothing in section 116 to make it necessary to give to it the construction contended for by the defendants' counsel.

It is expressly provided that the notice may be served concurrently with the summons, and that it is to be a two clear days' notice, and there is nothing to indicate that it is not to be made returnable until after the time allowed for filing a dispute notice has expired, and no reason why, having regard to the object to be attained—speedy judgment against a defendant who has no answer to the plaintiff's claim—the plaintiff's

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motion should be delayed until the time allowed for filing a dispute notice has expired.

The other objection is also not entitled to prevail. It is based upon the assumption that the provisions of Con. Rule 343 of the Supreme Court of Judicature for Ontario which excludes holidays in the computation of time where a period of less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, are applicable to the division courts, but that assumption is not well founded. No such provision is found in the Division Courts Act or the Division Courts Rules, and Con. Rule 343 has no application to proceedings in those courts.

If, however, this were not so, the insufficiency of the notice was, I think, cured by the enlargement from Tuesday until the following day, for that had the effect of giving the defendants two clear days' notice of the motion, even if holidays are to be excluded in the computation of time.

I express no opinion as to whether, had the learned Judge made the order upon a motion of which two clear days' notice had not been given, the order would have been made without jurisdiction, so as to entitle the defendants to such relief as they seek by their motion.

The motion must be dismissed with costs.

G. F. H.

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[IN CHAMBERS.]

PUTERBAUGH V. THE GOLD MEDAL MANUFACTURING COMPANY.

1902

*Trial—Libel—Jury Notice—Necessity for.*

Jan. 7.

In actions of libel it is not necessary to file and serve a jury notice.

THIS was a motion by the defendants to set aside the notice of trial served herein.

The motion was argued before Mr. Winchester, the Master in Chambers, on the 3rd of January, 1902. The facts appear in the judgment.

*F. C. Cooke*, for the motion.

*J. E. Jones*, contra.

January 7. THE MASTER IN CHAMBERS:—An action for libel in which the plaintiff has served notice of trial for the jury sittings commencing at Toronto on the 6th January inst., without first giving a notice of jury.

The defendants move to set aside the notice of trial on the ground that no notice of jury has been served as required by the Judicature Act, R.S.O. 1897, ch. 26, sec. 106.

The plaintiff's counsel contends that under sec. 102 the action must be tried by a jury, and therefore no jury notice is necessary.

Section 102 of the Act provides that, "In actions of libel . . . all questions . . . shall be tried by a jury unless the parties in person or by their solicitors or counsel, waive such trial."

Sections 103 and 104 provide for certain actions therein referred to being tried by a Judge.

Section 105 provides that, "Subject to rules of Court, all causes, matters and issues other than aforesaid, and the assessment or inquiry of damages therein may, and (subject to the provision of sec. 110) in the absence of such notice as in the next section mentioned shall be heard, tried and assessed by a Judge without a jury."

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Then comes the section which is relied upon to support the contention of the defendants, viz., 106, which provides as follows: "If any of the parties desires the issue of fact to be tried or damages to be assessed or inquired of by a jury, he shall at any stage of the proceedings but not later than the fourth day after the close of the pleadings, or in case notice of trial is served before that time, then within two days after service of notice of trial, or within such other time as may be ordered by the Court or a Judge, file and serve on the opposite party a notice in writing requiring that the issues should be tried or the damages assessed by a jury, and a copy of the notice shall be attached to the record or certified copy of the pleadings prepared for the Judge."

From the above provisions, and they are the only ones affecting the point in issue, it appears to me that the classes of actions provided for, are: (1) those in which the action shall be tried by a jury; (2) those in which the action shall be tried by a Judge; and (3) those in which the action may and in the absence of the notice referred to (sec. 106) shall be tried by a Judge, subject to his right to have the issues tried by a jury as provided for by sec. 110.

In my opinion it is the class of cases in which the action may, and in the absence of the jury notice shall, be tried by a Judge that is referred to in sec. 106 of the statute, and that in the class of cases referred to or mentioned in sec. 102 the provisions of sec. 106 do not apply, and that no jury notice is required to be given in such cases. The motion will therefore be refused with costs in the cause to the plaintiff.

G. F. H.

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[MEREDITH, C.J.C.P.]

CARSWELL ET AL. V. LANGLEY.

1902

Feb. 11.

*Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Annuitant—Right to Rank on Estate—Assignments Act.*

An insolvent made an assignment to the defendant for the benefit of creditors, pursuant to R.S.O. 1897, ch. 147. Previous to the assignment the defendant had covenanted with the plaintiffs to pay to J. R. \$100 per quarter on the first day of each quarter during her natural life :—

*Held*, that the growing payments were in the nature of contingent debts ; and that the plaintiffs were not entitled under R.S.O. ch. 147 to rank upon the estate of the insolvent for the present value of such payments.

*Grant v. West* (1896), 23 A.R. 533, and *Mail Printing Co. v. Clarkson* (1898), 25 A.R. 1, followed.

Such claims are not subject to attachment under the garnishee provisions of the English Judicature Act and Rules, as accruing debts.

*In re Cowans' Estate* (1880), 14 Ch. D. 638, has been disapproved in *Webb v. Stenton* (1883), 11 Q.B.D. 518.

MOTION by the plaintiffs for judgment on the pleadings in an action for a declaration that the plaintiffs are entitled to rank upon the estate of E. F. Robinson, in the hands of the defendant as assignee of the estate and effects by virtue of an assignment under the Assignments Act, R.S.O. 1897 ch. 147, as creditors of the estate in respect of an annuity of \$400. The facts and the contentions of the parties are stated in the judgment.

The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court, on the 23rd January, 1902.

*J. J. Warren*, for the plaintiffs.

*F. E. Hodgins* and *W. N. Irwin*, for the defendant.

February 11. MEREDITH, C.J.:—The defendant is the assignee for the benefit of creditors of one Ernest Frankish Robinson, by virtue of an assignment bearing date the 3rd day of September, 1901, and made pursuant to R.S.O. 1897 ch. 147, and this action is brought for the purpose of establishing the right of the plaintiffs to prove against and rank upon the estate of Robinson for the present value of \$100 per quarter, which he, before the date of the assignment, covenanted with them to pay to one Jane Robinson on the first day of each and every quarter during her natural life.

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It is clear that the growing payments to be made to Mrs. Robinson, being payable during her natural life, are in the nature of contingent debts.

Under the early English Bankruptcy Acts, such claims were not provable, the arrears actually accrued before the bankruptcy alone being provable: *Perkins v. Kempland* (1776), 2 W. Bl. 1106; Robson on Bankruptcy, 7th ed., pp. 238, 246.

This proceeded upon the view that the growing payments were not debts, but became debts only upon the happening of a contingency, *i.e.*, the annuitant being alive at the time when they were to be made.

The language of ch. 147 makes it necessary to give to it the same construction as was in that respect placed upon the early Bankruptcy Acts to which I have referred; and that such claims as that which the plaintiffs seek to prove are not provable under ch. 147, is settled by *Grant v. West* (1896), 23 A.R. 533, and *Mail Printing Co. v. Clarkson* (1898), 25 A.R. 1, from which it is impossible to distinguish this case.

It was argued by Mr. Warren that such claims had been held to be subject to attachment under the garnishee provisions of the English Judicature Act and Rules, as accruing debts. Had he been able to establish that proposition, the decisions of the Court of Appeal of this Province would, nevertheless, have prevented me from giving such a construction to the provisions of the Act now under consideration. The decided cases do not, however, support his contention: *Webb v. Stenton* (1883), 11 Q.B.D. 518, and cases there cited, disapproving of the decision of Vice-Chancellor Hall in *In re Cowans' Estate* (1880), 14 Ch. D. 638.

I see no escape from the conclusion—however hard the law may press upon the annuitant—that the claim is not one provable against the estate of the assignor, and there must therefore be judgment for the defendant, but without costs.

T. T. R.



[LOUNT, J.]

GEGG V. BASSETT.

1902

Feb. 13.

*Trade-mark—Assignment—Execution.*

The right of property in a registered specific trade-mark is not saleable by itself under a writ of execution. Such a right can be sold, if at all, only as appurtenant to the business in which the trade mark has been used.

MOTION by the plaintiff to continue until the trial an injunction granted *ex parte* by Lount, J.

The facts were somewhat complicated, but for the purpose of this report a brief outline of them is sufficient.

On the 8th of February, 1900, the defendant Bassett, who was the registered owner under the Trade Mark and Design Act of two specific trade marks, "Dr. Arnold's English Pills" and "Perspirine," used in connection with the sale of two patent medicines, assigned these trade marks to the Arnold Chemical Company, Limited, its successors and assigns, with the sole right to use them in Canada, covenanting with the company, its successors and assigns, that he would not use the trade marks or interfere with the use thereof by the company, its successors or assigns. This assignment was duly registered by the company, who, under the assignment and a previous agreement, continued for some time to make and sell the two medicines and to use the trade marks. In November, 1901, the sheriff seized, under an execution against the company, its stock-in-trade, consisting in part of medicines of the two kinds named, also a quantity of wrappers, labels, and circulars used in connection with the sale thereof, and also the certificates of the two trade marks, and all these were sold by the sheriff to the plaintiff, and assigned to him, as was alleged, by a bill of sale, duly registered, as to the trade marks, in the proper department. The defendant subsequently began to use the two trade marks and to make and sell medicines under the names in question, and this action was brought to restrain him from so doing.

The motion to continue the injunction was argued before LOUNT, J., on the 13th of February, 1902.

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*L. V. McBrady*, for the plaintiff. [After his statement of the facts, the learned counsel was directed to confine his argument to the question of the plaintiff's title under the sheriff's sale]. It is expressly provided by sec. 16 of the Trade Mark and Design Act that a trade mark shall be assignable in law, and there is no reason why an adverse assignment by means of a sale under execution should not be given effect to. A patent right may be seized and sold: *Frost on Patents*, 2nd ed., p. 364, and the right to a trade mark is one of an analogous character. The right is a chose in action and in that view also is exigible: *Warren on Choses in Action*, p. 25. See also 26 *Am. & Eng. Encyc.* 1st ed., p. 381, "Assignment of Trade Marks." At any rate, the defendant, a wrongdoer, cannot set up this objection; and in his assignment to the Arnold Chemical Company the possibility of a further assignment is provided for.

*Laidlaw*, K.C., for the defendant. It must of course be admitted that the right to use a trade mark can be assigned, but there cannot be an assignment in gross, such as is in this case attempted to be supported, but only an assignment in connection with the goodwill of the business in which the trade mark has been used: *Sebastian on Trade Marks*, 4th ed., p. 98. The objection is open to the defendant, for the plaintiff must shew a valid registered title before he can sue. [The learned counsel also discussed the form of the bill of sale, arguing that it did not in terms purport to assign the right to the trade marks in question].

*McBrady*, in reply.

LOUNT, J.:—I think there is no doubt that a case of infringement has been made out, and were it not for the difficulty as to the plaintiff's title I should certainly continue the injunction till the trial. That difficulty was not present to my mind when I granted the *ex parte* injunction, but now that the point has been fully discussed, I have come to the conclusion that the objection taken by Mr. Laidlaw is fatal, and that I must dismiss the motion. I am clearly of opinion that a right to a trade mark is not exigible under execution and therefore that no title passed to the plaintiff. The sheriff could seize and sell only goods and chattels or an interest therein, and the right to a trade mark is something quite different. The right is assign-

able it is true, but only, I think, in connection with the goodwill of the business, general or specific, in which the trade mark has been used. The seizing, selling, and handing over to the plaintiff of the certificates, which were useful only as evidences of title, did not vest any right in him, and he has not, I think, obtained any title to the trade marks by what has taken place. It is open to question, too, whether the bill of sale does in terms assign the rights contended for, but it is not necessary to discuss that question, and I decide the case on the broader ground. I dismiss the motion with costs.

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[MACMAHON, J.]

KEITH V. OTTAWA AND NEW YORK RAILWAY COMPANY.

1902

*Railway—Negligence—Opportunity to Alight.*

Feb. 10.

A railway company which has undertaken to carry a passenger to a station on its line must stop its train at that station long enough to give the passenger a reasonable opportunity of getting off. If the train stops and the passenger, after making reasonable efforts to do so, is unable to get off before it starts again, and jumps off and is injured, the company is liable in damages; provided, however, that when the passenger jumps off the train is not moving at such a rate of speed as to make the danger of jumping obvious to a person of reasonable intelligence.

THIS was an action to recover damages for injuries sustained by the plaintiff while getting off a car of the defendants at Finch station, to which station they had contracted to carry him as a passenger, and it was tried at Ottawa on the 13th of January, 1902, before MACMAHON, J., and a jury.

The plaintiff's contention was that the train stopped at the station in question only about half a minute; that although he lost no time in endeavouring to get off the car he was delayed by passengers getting on the car, so that when he reached the platform of the car the train was moving again from the station; that he thought the train was moving so slowly that

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he could jump off safely, but that after jumping he fell on the station platform and severely injured his hip.

There was a great deal of conflicting evidence on some of these points. Evidence was given on behalf of the defendants that the train stopped at the station in question at least two minutes; that not more than two passengers got on the car; and that the plaintiff would have had plenty of time to get off the car safely had it not been that when the train stopped at the station he was talking to a friend and did not attempt to get off until too late. . It was proved that when attempting to get off the plaintiff was carrying a large bundle, and it was contended that the accident was partly due to his being encumbered with this bundle and partly to the careless way in which he made the jump. It was also contended, as a matter of law, that the plaintiff in jumping from the moving car did so at his own risk, and that, even assuming that the proper time had not been allowed, he should not have jumped off, but should have remained on the car and have brought an action against the defendants for damages for carrying him beyond his destination.

Judgment was reserved on a motion for a nonsuit, and questions were submitted to the jury, and these questions, with their answers to them, were as follows:—

(1) How long did the train stop at Finch station? A. Cannot say.

(2) Was the time the train remained there sufficient to enable the plaintiff to alight? A. No.

(3) Was Keith aware when he reached the platform of the car that the train was in motion? A. Yes.

(4) If Keith was guilty of any negligence which contributed to the accident what was such negligence? A. None.

(5) If Keith is entitled to recover at what do you assess the damages? A. \$1,000.

*George McLaurin*, for the plaintiff.

*Wallace Nesbitt*, K.C., and *W. H. Curle*, for the defendants.

February 10. MACMAHON, J.:—I reserved the consideration of the motion by counsel for the defendants for a nonsuit, and have reached the following conclusion:



The motion for a nonsuit cannot prevail. In my charge to the jury I said: "If they (the company) gave the plaintiff ample facilities to get off and he did not do so but attempted to get off when he knew there was danger in getting off, the company ought not to be held responsible for his act, and, looking at it in that way, it is for you to say whether he acted reasonably in getting off under the circumstances appearing in the evidence." The answer, therefore, to the fourth question, that the plaintiff was not guilty of any negligence which contributed to the accident, is a finding that he was acting as a reasonable man would in getting off the train, although it was in motion. And according to the evidence of Daniel E. Seese, the company's station agent at Finch, the car had only got thirty feet when the plaintiff got off, and the jury might properly conclude the plaintiff was not acting unreasonably in endeavouring to alight.

In *Washington Railroad v. Harmon* (1892), 147 U.S. 571, the Chief Justice, Fuller, in delivering the judgment of the Supreme Court, said (p. 583): "The duty resting upon the defendant was to deliver its passenger, and that involved the duty of observing whether he had actually alighted before the car was started again. If the conductor failed to attend to that duty, and did not give the passenger time enough to get off before the car started, it was necessarily this neglect of duty that did the mischief. It was not a duty due to a person solely because he was in danger of being hurt, but a duty owed to a person whom the defendant had undertaken to deliver, and who was entitled to be delivered safely by being allowed to alight without danger."

In *Central R. W. Co. v. Miles* (1889), 88 Ala. 256, where the plaintiff, who was a passenger, got up from his seat as soon as the train stopped at the station and moved towards the door and when he reached the platform found the train had started, but he notwithstanding stepped off and was injured, it was held by the Supreme Court of Alabama that he was not guilty of contributory negligence as a matter of law, but that the question was properly submitted to the jury. The Court said (p. 262): "The general rule, established by the weight of authorities, is, that where the train is stopped at a station to

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which the company contracted to carry a passenger, the company is liable if a reasonable time to leave is not afforded and he is injured in the attempt to alight after it is started and while in motion, if he does not, in getting off, incur a danger obvious to the mind of a reasonable man. But, notwithstanding the company may be in fault, a passenger is not justified, in order to avoid being carried beyond his stopping place, to defy obvious danger, such as an attempt to jump from a train in rapid motion. But an attempt for such purpose is not negligence in law if the train was stopped, but not a reasonable time, and is moving so slowly that to alight from it would not appear dangerous to a man of ordinary prudence."

See also *Loyd v. Hannibal R.W. Co.* (1873), 4 Am. Neg. Cas. 481; *Covington v. Western R.W. Co.* (1888), 81 Ga. 273; *Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754; *Filer v. New York Central R.W. Co.* (1872), 49 N.Y. 47.

I direct that judgment be entered for the plaintiff for \$1,000, with costs.

R. S. C.

[LOUNT, J.]

UNION BANK OF CANADA V. RIDEAU LUMBER COMPANY.

1901

Dec. 18.

*Damages—Trespass—Wrongful and Wilful—Mode of Assessment.*

Where, in an action of trespass, the judgment is that the trespass was wrongful and wilful, the assessment of damages must be on the basis of such finding, and not as if the trespass was done innocently or *bonâ fide*.

THIS was an appeal from the report of the local Master\* at Ottawa. The action was for trespass for cutting and carrying away the plaintiff's timber; and the grounds of appeal, among others, were that the learned Master should have assessed the damages during the seasons 1897-1898 and 1898-1899, on the footing of damages for wilful trespasses and not for an innocent or *bonâ fide* trespass.

The appeal was heard before LOUNT, J., in the Weekly Court at Ottawa on February 12th, 1901.

*J. T. Lewis*, for the plaintiffs.

*G. Henderson*, for the defendants.

December 18. LOUNT, J.:—In my opinion the plaintiffs appeal in this case from the report of the learned Master should be allowed on the first and second grounds taken—that is, that the learned Master should have assessed the damages during the seasons of 1897-98 and 1898-99, on the footing of damages for wilful trespasses and not for an innocent or *bonâ fide* trespass, as he did.

The learned Master applied the wrong rule in assessing damages in a case of this kind. He applied the mild when he should have applied the severe rule.

The statement of claim alleges a wrongful and wilful trespass. The formal judgment "declares and adjudges that the plaintiffs have the right to recover damages from the defendants in respect of the matters complained of in the statement of claim"—that is, a right to recover damages for the wrongful and wilful trespasses committed. And by the judgment it is referred to the learned Master "to ascertain the

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value of the timber cut and the damage to the plaintiffs from and incidental to the cutting down and carrying away thereof, and other trespasses committed by the defendants upon and in respect to the plaintiffs' timber limits." Clearly this means the damages wrongfully and wilfully committed by the defendants.

Moreover, the learned trial Judge, in his written judgment, after carefully reviewing the evidence, says: "The defendants are, therefore, liable from every possible standpoint." Liable for what?—for what was complained of: the trespasses wrongfully and wilfully committed; and, in my judgment, the evidence fully warranted such a conclusion—warranted a finding that the trespasses were committed in fraud. The rule, therefore, applicable in this case—that is, the severe and not the milder rule—should be applied in determining the amount of damages to be paid by the defendants: see *Hilton v. Woods* (1867), L.R. 4 Eq. 432, at p. 440, approved of by Mr. Justice Street in *Smith v. Baechler* (1889), 18 O.R. 293, at p. 294; and in *Trotter v. Maclean* (1879), 13 Ch. D. 574 at p. 586, where Mr. Justice Fry collects all the cases governing the application of this rule. See also *Woodenware Co. v. United States* (1882), 106 U.S.R. 432; Sedgwick on Damages, 8th ed., vol. 2, sec. 504.

Because of the view I have taken in allowing the appeal on the first and second grounds, it is not necessary to consider the further grounds of appeal, nor is it necessary to consider the cross appeal of the defendants.

I, therefore, allow the plaintiffs' appeal, as stated, with costs, and I dismiss the defendants' cross appeal with costs. And I direct a reference back to the learned Master to ascertain the damages to be recovered from the defendants in respect of the matters complained of in the statement of claim during the seasons 1897-98 and 1898-99 on the footing of wrongful and wilful trespasses.

G. F. H.

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## [DIVISIONAL COURT.]

## IN RE THURESSON, MCKENZIE V. THURESSON.

1902

Jan. 6.

*Mortgage—Mortgagee so dealing with Property as to Lose Power to Reconvey—Action on Covenant—Discharge—Right of Way.*

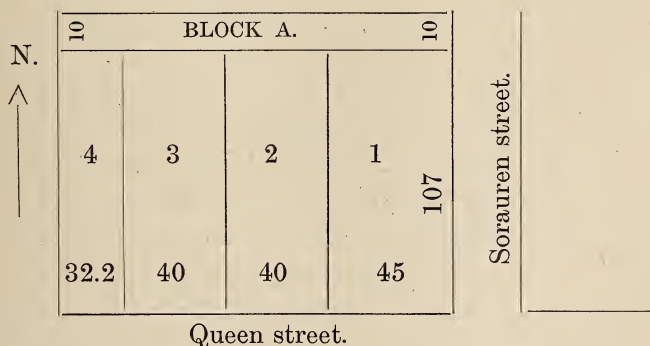
A mortgagee not only discharged a portion of the mortgaged lands upon part payment, as he was entitled to do under the mortgage, but also assented to a right of way across the whole of the property granted by the then owners of the equity to a purchaser of a portion of it, and released such right of way from his mortgage:—

*Held*, that the mortgagee having debarred himself from restoring the mortgaged lands unaltered in character and quantity, in a manner unauthorized by the terms of the mortgage, owing to the right of way, an assignee of the mortgage could not claim under the covenant therein in an administration of the mortgagor's estate.

It is proper, however, in such a case that the claimant should have an opportunity within a limited time to get into a position so to restore the land, and twenty days were here allowed for that purpose.

The estate of Eyre Thuresson, being under administration in these proceedings, Susanna M. Abercrombie claimed to be a creditor of the deceased under the following circumstances:—

The deceased Eyre Thuresson was the owner in fee of lots 1, 2, 3 and 4 and block A on the north-west corner of Queen and Sorauren streets in the town of Parkdale. These lots were shaped as follows:—



On October 15th, 1887, Eyre Thuresson mortgaged the four lots and block A to one Clare for \$11,000, payable in 1892, with interest half-yearly meantime at 6 per cent. In the mortgage the lots were described as lots 1, 2, 3 and 4 and block A on the N.W. corner of Queen and Sorauren streets, "said lots and block A having a frontage of 157 feet 2 inches on Queen street

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by a depth of 117 feet." The mortgage contained an agreement on the part of the mortgagee, his executors, administrators and assigns to "release and discharge at any time or times, and without any notice or bonus, any portion or portions of the land above described, having at least a frontage of 20 feet, upon payment by the mortgagors, their heirs, executors, administrators or assigns at the rate of \$71 per foot frontage for the portion or portions required to be released or discharged as aforesaid." The mortgage also contained the statutory power of sale on one month's notice after two months' default, and the usual statutory conditions.

On December 5th, 1888, Thuresson conveyed his equity of redemption to Bryce, who covenanted to indemnify him against the mortgage. On June 17th, 1889, Bryce conveyed to Hickson with a similar covenant. Hickson died on January 8th, 1892, and his estate vested in his widow, Margaret Hickson, and one McCleary, his executor and executrix. Hickson's estate was administered under order of Court and in the proceedings there a portion of the block in question, described as follows, was sold and conveyed to one McQuillan for \$3,200, that is to say, "the easterly 40 feet from front to rear of lot number one on the north side of Queen street and the west side of Sorauren avenue . . . having a frontage of 40 feet by a depth of 107 feet. Together with the right of way for all purposes over lot A shewn on said plan."

Lot A is the same as block A upon the plan. The conveyance to McQuillan is dated January 20th, 1893, and on the same day Clare executed a statutory discharge in part from the Thuresson mortgage, certifying that the executors of Hickson had satisfied \$2,200, part of the monies secured thereby, and discharging the parcel of land and the right of way exactly as described in the conveyance to McQuillan. McQuillan, on the following day, made a mortgage to Clare with the same description, securing \$2,200.

On February 11th, 1901, Clare assigned the Thuresson mortgage to William Abercrombie after crediting upon it the \$2,200; and on June 15th, 1901, William Abercrombie assigned it to Susanna M. Abercrombie, who filed a claim as a creditor of the estate of Eyre Thuresson upon the covenant con-

tained in the mortgage. The executors of Thuresson disputed the claim upon the ground that the mortgagee had put it out of his power to give back the mortgaged premises on payment of the mortgage debt, and that the covenant was gone.

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Mr. McLean, official referee, sitting for the Master in Ordinary, disallowed the claim for the reasons urged by the executors of Thuresson, and Miss Abercrombie appealed to the Divisional Court upon the ground that the discharge of the parcel in question was within the terms of the mortgage, and was, therefore, authorized.

The appeal was argued in the Divisional Court on December 12th, 1901, before FALCONBRIDGE, C.J.K.B., and STREET, J.

*E. D. Armour*, K.C., and *R. U. McPherson*, for the appellant, contended that it was a mere matter of accounting: *Palmer v. Hendrie* (1859-60), 27 Beav. 349, S.C. 28 Beav. 341; that the appellant was willing to give credit for all the purchase money received and on doing that was entitled to claim for the balance: *Land Security Co. v. Wilson* (1895-6), 22 A.R. 151, 26 S.C.R. 149; *Taylor v. Bank of New South Wales* (1886), 11 App. Cas. 596, especially at p. 602; *Pearl v. Deacon* (1857), 24 Beav. 186; that when a mortgagor is sued, as here, his right of redemption revives and he is entitled to have the mortgaged land reconveyed to him as it was when he mortgaged it, and a fresh mortgage put on the land by a grantee of the equity of redemption is not a charge as against the original mortgagor: *Kinnaird v. Trollope* (1888), 39 Ch. D. 636; that the appellant could not create a new right such as a right of way by a discharge; and that the right of way here was bad because there was no terminus *a quo* nor *ad quem*; if a good right of way at all it could only be a right to go out to Sorauren avenue: *Telfer v. Jacobs* (1888), 16 O.R. 35; *Purdum v. Robinson* (1899), 30 S.C.R. 64; *Goddard on Easements*, 4th ed., p. 377.

*J. D. Montgomery*, for the executors of Eyre Thuresson, contended that the claim should not be allowed, because the land could not be conveyed back to the mortgagor as it was when the mortgage was given; and that the right of way was clearly defined by the registered plan: *Schoole v. Sall* (1803), 1 Sch. & L. 176; *Trust and Loan Company v. McKenzie*

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(1896), 23 A.R. 167, at p. 173; *Allison v. McDonald* (1894), 23 S.C.R. 635, at pp. 638-9; *Campbell v. Rothwell* (1877), 38 L.T.N.S. 33; *Barber v. McQuaig* (1897-8), 24 A.R. 492; 29 S.C.R. 126; *Forster v. Ivey* (1900-1), 32 O.R. 175; S.C. in App., 21 C.L.T. 550; *Gowland v. Garbutt* (1867), 13 Gr. 578; Ashburner on Mortgages, p. 352.

*Armour*, in reply, referred to *Barber v. McQuaig* (2) (1900), 31 O.R. 593.

January 6. STREET, J. [after stating the facts as above]:—The rule is that as soon as the mortgage money is fully paid, it is the duty of the mortgagee to restore the estate; and if by his dealing with the property, otherwise than with the consent of the mortgagor, he has put it out of his power to restore the estate, he cannot recover in an action upon the covenant: *Palmer v. Hendrie*, 27 Beav. 349; *Perry v. Barker* (1806), 13 Ves. 198; *Gowland v. Garbutt*, 13 Gr. 578; *Munsen v. Hauss* (1875), 22 Gr. 279.

A mortgagor, although he has parted with his equity of redemption in the land, is entitled to redeem the mortgage upon being sued on his covenant: *Kinnaird v. Trollope*, 39 Ch. D. 636.

It is plain, therefore, I think, that the plaintiff is not entitled to judgment upon the covenant in Eyre Thuresson's mortgage of which she is assignee, unless she is in a position to restore to his executors, when they pay the mortgage money, the estate covered by the mortgage unaltered in character and quantity except to the extent permitted by the terms of the mortgage.

In the present case the mortgagee is compellable by the terms of his instrument to discharge at any time or times any portion or portions of the land described in it, having at least a frontage of twenty feet, upon payment by the mortgagor or his assigns of \$71 a foot frontage for the portion discharged. Reading this in connection with the description of the block of land covered by the mortgage, it must be taken to mean that on payment of \$71 per foot for the frontage on Queen street, the mortgagee must release, if required to do so, the whole depth of the block to the north limit of block A. This is the only



power he possessed of discharging any part of the mortgaged premises from the mortgage, for although he has a power of sale, it is admitted that that power has not been exercised. Whatever land, then, has not been discharged under the power to discharge on payment of \$71 a foot contained in the mortgage, the mortgagee must be ready to restore to the mortgagor on payment of the mortgage money.

Is Miss Abercrombie ready to restore the land covered by the mortgage, excepting that which she has released? Clearly not, for she has assented to the creation of a right of way over block A, and she can now restore block A only subject to this right of way. It is said that the grant of the right of way does not affect in reality any part of block A, excepting the part immediately to the north of the land released, because there is no sufficient description of the purpose for which it is granted, no *ex quo* nor *ad quem*. It is not necessary that we should here determine the limits of the right. The grant of it was made by persons owning not only block A itself but portions of the land adjoining it on the south, and the grant will be taken most strongly against the grantors. The mortgagee has no right to encumber the mortgagor's rights even by the creation of a cloud, to remove which an expensive lawsuit may be necessary. If the right of way had been limited to the portion of block A lying immediately to the north of the portion of lot No. 1, which was released, I do not see that the mortgagor could have objected, because the power given would have enabled the mortgagee to release *in toto* the strip as far north as the north line of A, and the mortgagor cannot complain if less has been released than might have been—a right of way over a piece, when the piece itself might have been released. It is in granting a right of way over the rest of the lot that the mortgagee has exceeded the authority conferred by the mortgage and has disabled himself from recovering.

It seems proper, however, in such cases to give to the mortgagee claiming under the covenant an opportunity within a limited time to put himself into a position to restore the estate upon payment of the mortgage money. Under the former system, when law and equity were administered in different courts, Miss Abercrombie would have been entitled to

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recover at law, but a court of equity would have restrained her from recovering unless she could put herself in a position to reconvey the mortgaged premises, in which event an injunction would not be granted: *Perry v. Barker*, 13 Ves. 198, at p. 205; *Munsen v. Hauss*, 22 Gr. 279; *Forster v. Ivey*, 32 O.R. 175.

Counsel have asked to be allowed to procure a release of the offending grant so far as it purports to give a right of way over any part excepting that to the north of the forty feet released.

I think the proper order will be to dismiss the present appeal with costs, but with a declaration that if within twenty days from the date of the order dismissing the appeal, the appellant brings into the Master's office evidence that she has put herself in a position to restore the estate so far as she is bound to do so under the terms of the mortgage, she be admitted to prove her claim.

The question of *quantum* will, of course, then come to be considered, and the mortgagee will be charged with such a sum as would have entitled her to release the forty feet, *i.e.*, with \$2,840. Against this sum she will be entitled to charge any disbursements properly made by Clare or herself in preserving the mortgaged property, and allowable in such cases.

FALCONBRIDGE, C.J.K.B.:—Since the argument in the Divisional Court, counsel for the mortgagee has sought to put in documents purporting to be releases or disclaimers of the right of way executed by the owners of the equity of redemption in other parcels in favour of the mortgagee.

It is manifest that we could not consider the matter in this altered aspect of affairs, except on such terms as would be at least as onerous to the mortgagee as those contained in the rider to my learned brother Street's judgment, which judgment I have perused and in which I entirely concur.

*Perry v. Barker*, 13 Ves. at p. 205, furnishes abundant authority for the declaration.

This appeal will, therefore, be dismissed with costs, with the declaration allowing the appellant to bring the evidence into the Master's office.

[IN CHAMBERS.]

KIDD V. HARRIS.

1902

Feb. 21.

*Appeal—Leave to Appeal—Special Circumstances.*

In an action which at the trial resolved itself into two branches, (1) The status of some of the parties, and (2) the testamentary capacity of the testator and the validity of the will propounded; the trial Judge dealt with the validity of the will on y, and on an appeal, a Divisional Court dealt with the question of status only:—

*Held*, upon an application for leave to appeal to the Court of Appeal that although the applicants had the judgments of two tribunals against them they had the opinion of but one Court in respect of either branch of the case, and in view of the value of the estate and the important consequences to them, sufficient special circumstances were shewn to entitle them to leave to appeal.

THIS was an application for leave to appeal to the Court of Appeal. The judgment of the Divisional Court referred to *infra* is reported *ante* p. 60.

The application was argued in Chambers on February 18th, 1902, before Moss, J.A.

*H. M. Mowat*, K.C., for the applicants John and Charles Harris.

*G. E. Kidd*, for plaintiffs, the executors.

*A. Mills*, for D. Eligh and specific legatees.

*J. H. Spence*, for C. H. Harris and residuary legatees.

February 21. Moss, J.A.:—I think this is a proper case for giving leave to appeal.

At the trial the case appears to have resolved itself into two branches, one involving the question of the legitimacy of the present applicants, John and Charles Harris, as sons of the testator: the other involving the question of the testamentary capacity of the testator and the validity of the will propounded by the plaintiffs.

The learned trial Judge dealt only with the latter branch, and, being of the opinion that the will was valid, did not deem it necessary to decide the question of the status of the present applicants.

Upon appeal by them to a Divisional Court, the point was taken that they were the only appellants and that if it was

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shewn that they were not the legitimate sons of the testator, they had no *locus standi* to contest the will.

The Divisional Court dealt only with this question, and found upon the evidence, that before the time when the appellants' mother and the testator were shewn to have been living together as man and wife, the testator had gone through the ceremony of marriage with one Eliza Harris, the widow of his deceased brother, and that she is still alive. It was also held, as a matter of law, that the said marriage—though voidable—not having been declared void in the lifetime of both parties, could not be declared void after the testator's death, and the testator could not be deemed to have been legally married to the appellants' mother.

Upon these grounds the appeal was dismissed. The question of the validity of the will was not disposed of.

The result is, that while the appellants have the judgment of two tribunals against them, they have the opinion of but one Court in respect of either branch of the case. The value of the estate is variously stated, but accepting even the plaintiffs' estimate, the amount at stake is large.

In view of these facts, and considering the very important consequences of the decision of the Divisional Court to the applicants in relation to their civil status, I consider that sufficient special circumstances have been shewn to entitle them to obtain the opinion of this Court upon the case.

There was some discussion as to whether the question of the applicants' status was fully and satisfactorily presented and tried, but with this I have not now to deal.

I am unable, consistently with other decisions, to see my way to dispensing with security. See *Thuresson v. Thuresson* (1899), 18 P.R. 414.

The order will be that the applicants be at liberty to appeal to this Court upon the usual terms. Time for giving notice of appeal extended for two weeks. The appeal to be entered for argument at the next sittings. Costs in the appeal.

G. A. B.



[IN CHAMBERS.]

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RE WATTS.

Feb. 17.

*Bail—Extradition—Appeal—Single Judge.*

An application to a single Judge of the Court of Appeal to admit to bail a person committed for extradition, pending an appeal to that Court, was refused by him on the grounds, (1) That it did not appear that the applicant was in actual custody, and (2) it was doubtful if a single Judge of such Court had power to make the order, a matter of bail not being regarded as incidental to the appeal, and so capable of being dealt with by a single Judge under sec. 54 of the Judicature Act.

*Quere*, as to the propriety of granting bail in extradition proceedings otherwise than *de die in diem*, pending the hearing of a motion for *habeas corpus* on an appeal.

THIS was an application to a Judge of the Court of Appeal on behalf of a person committed for extradition, to admit him to bail, pending an appeal from an order of Street, J., refusing to discharge him under a *habeas corpus*.

The application was heard on February 17th, 1902, in Chambers, before OSLER, J.A.

*F. A. Anglin*, for the application cited *The King v. Bethel* (1701), 5 Mod. 19 at p. 22.

*Shepley*, K.C., shewed cause.

February 17. OSLER, J.A. :—The accused was committed for extradition for an offence which may be called child stealing, something like that which is provided for by section 284 of our Criminal Code.

He was brought before Street, J., on a writ of *habeas corpus*. Street, J., refused to discharge him, and he now stands remanded for extradition.

Pending the *habeas corpus* proceedings, accused obtained from Britton, J., an order admitting him to bail, the condition of the recognizance being that in the event of his being remanded for extradition by a Judge of the High Court, he should forthwith surrender himself to the keeper of the common gaol of the county of Essex.

He has now appealed to this Court under section 6 of the Habeas Corpus Act, R.S.O. 1897, ch. 83, and Mr. Anglin applies

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on his behalf for an order to admit him to bail pending the appeal.

I do not see my way to make the order, for: (1) It does not appear that he is in actual custody; (2) I doubt of my power as a single Judge of the Court of Appeal to make it. The appeal is by statute to the Court, and I do not regard a matter of bail as one incidental to the appeal and so capable of being dealt with by a single Judge under section 54 of the Ontario Judicature Act.

In the Court below a single Judge had jurisdiction in *habeas corpus*, and therefore in the matter of bail, if it was right to grant bail at all, which I am not now concerned to deny.

These grounds are sufficient to prevent me from entertaining the application, but, regarding the question as one of discretion, I should be very slow to admit to bail a person who has been arrested or committed for extradition. I cannot recall an instance of its having been done, though possibly a search, had I the time to make it, might shew that it is not absolutely without precedent.

The Court will meet as soon as possible to hear the appeal, and upon the power of the Court to admit to bail, *de die in diem*, should they think proper to do, I do not for a moment reflect.

Note.—The appeal came on to be heard before the full Court on the 19th February. The appellant was not in Court, and it appeared that he was not in custody, not having surrendered himself in pursuance of the order of Britton, J. The Court declined to hear the appeal until he should have done so, and in the result the appeal was not further prosecuted.—REP.

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[MEREDITH, J.]

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Nov. 13.

*Assessment and Taxes—Action on Mortgage—Conveyance of Equity of Redemption to Purchaser at Tax Sale—Onus of Proof of Taxes Due—Improvements—63 Vict. ch. 103, sec. 11 (O.).*

In an action for foreclosure of a mortgage of land in Toronto Junction, defendant set up a purchase at a tax sale prior to 1899 and a conveyance of the equity of redemption to him from the mortgagor, but did not prove the regularity of the sale or that taxes were in arrear, and also claimed for improvements as made under a mistake of title:—

*Held*, that the onus of proof that there were taxes in arrear for which land might rightly be sold was upon the person claiming under the sale for taxes and had not been satisfied.

*Stevenson v. Traynor* (1886), 12 O.R. 804, followed.

*Held*, also, that sec. 11 of 63 Vict. ch. 103 (O.), "An Act Respecting the Town of Toronto Junction," declaring that all sales of vacant lands for taxes held prior to the year 1899 in the said town were thereby ratified and confirmed, means sales for taxes for which the lands might rightly be sold.

*Held*, lastly, under the circumstances here, that there was no valid claim for improvements, as defendant had simply improved his own land, which he took subject to the mortgage.

THIS was an action for foreclosure of a mortgage against John Joss, the mortgagor, and George Lyon, a purchaser of the mortgage premises at a tax sale.

The action was tried on the 23rd October, 1901, at Toronto, before MEREDITH, J., without a jury.

The defendant Lyon purchased the property at a tax sale from the town of Toronto Junction, on April 11th, 1896, the deed to him bearing date August 4th, 1897.

On May 22nd, 1896, Lyon obtained a deed from Joss, the mortgagor, and his wife, of the land covered by the tax deed except 40 feet, and later on another deed from the town in order to correct a clerical error in the description.

At the trial, on behalf of the plaintiff the mortgage from Joss to the plaintiff and the deed from Joss to the defendant Lyon were proved, as well as the fact that the mortgage was in arrear.

On behalf of the defendants the tax deeds were put in and admitted, and the fact of the tax sale, but no evidence was given as to taxes being in arrear or as to the regularity of the tax sale.

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*James Haverson*, for the plaintiff, contended that no tax title had been proved sufficient to over-ride the mortgage, and that Lyon having obtained a conveyance from Joss of the equity of redemption could not set up a tax title against the mortgage.

*W. E. Raney*, for the defendant Lyon, contended that the deed from Joss was taken by mistake and was a nullity, and that the tax title was not affected by it, and as the tax deeds were more than two years old they could not be attacked in this action: 58 Vict. ch. 90, sec. 13 (O.), 63 Vict. ch. 103, sec. 11 (O.), and the Assessment Act, R.S.O. 1897, ch. 224, secs. 193 to 222.

November 13, 1901. MEREDITH, J.:—The onus of proof that there were taxes in arrear for which the land might rightly have been sold is generally speaking upon the person claiming under the sale for taxes: see *Stevenson v. Traynor* (1886), 12 O.R. 804, and it has not been satisfied.

But it is said that special legislation affecting the town of Toronto Junction alters the case.

The Acts relied on are 58 Vict. ch. 90, secs. 12 and 13 (O.), and 63 Vict. ch. 103, sec. 11 (O.).

But the first of these enactments does not apply to this case, the taxes in question having been imposed too early.

And the other, which is in these words, "All sales of vacant lands," etc., cannot, having regard to the strong view of the Supreme Court of Canada upon the subject, be held to give title, whether or not there were any taxes in arrear when the sale took place. "Sales . . . for taxes" must be held to mean sales for taxes for which the lands might rightly be sold: see *McKay v. Chrysler* (1879), 3 S.C.R. 436, and *Whelan v. Ryan* (1891), 20 S.C.R. 65.

If the provisions of the Act of 1895 as to the onus of proof of payment of taxes, and authorizing a sale for taxes one year in arrear were applicable, a different conclusion might perhaps be reached.

The defendant has, therefore, not shewn any title under the tax deed; and if he had, it could afford, at most, a defence as to forty feet of one of the part lots only; for the owner of the



equity of redemption cannot destroy his mortgagee's rights by neglecting to pay taxes and taking a deed under a sale for such taxes : see *Leigh v. Burnett* (1885), 29 Ch. D. 231.

Nor can there be any valid claim for improvements, as if made under a mistake of title. There was no such mistake ; the defendant knew he was owner, *subject to the mortgage*. He had so purchased, and so expressly taken his conveyance ; and no one seeks to deprive him of improvements or land ; all the plaintiff seeks is payment of his mortgage debt ; the defendant simply improved his own land, which he took subject to the mortgage : see *Beaty v. Shaw* (1888), 14 A.R. 600.

There will be the usual judgment for foreclosure or sale, but there will be no "personal order" against this defendant for debt or costs, they, the debt and such costs as he is liable for, must be made from the other defendant, or out of the lands if not redeemed.

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[CHAMBERS.]

RE MARTIN AND MERRITT.

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Nov. 29.

*Vendor and Purchaser—Mortgage—Notice of Sale—Service of—Recital in Deed—“Assigns”—Devolution of Estates Act—Caution—Non-registration of—Service of Notice of Sale on Infant Heir.*

By a provision in a mortgage of realty no want of notice required by the mortgage was to invalidate any sale thereunder, but the vendor was alone to be responsible. The conveyance made on a sale under the power of sale in the mortgage contained a recital that service of the notice had been duly made on the mortgagor and his wife, who had joined to bar her dower, and there was no evidence of the untruth of such recital and the purchaser's knowledge of its untruth:—

*Held*, that a subsequent vendor of the land in making title on a sale thereof could not be called on to furnish any other evidence of such service.

*Held*, also, that the objection being as to proof of service on the wife no such evidence was in any event required, for by the terms of the power of sale in the mortgage which was made in pursuance of the Short Form Act service was to be made on the mortgagor, his heirs or assigns, and the wife was not an “assign” within the meaning of the power.

After the coming into force of the Devolution of Estates Act and after the expiration of a year from the death of the mortgagor a married woman, no caution having been registered, sale proceedings under the power were taken on the mortgage:—

*Held*, that service of notice of sale on the husband and the heirs of the mortgagor, two infant daughters, was sufficient, it not being necessary under such circumstances to serve the personal representatives.

THIS was an application under sec. 4 of the Vendors and Purchasers Act, R.S.O. 1897 ch. 134, for the opinion of the Court on certain objections raised by the purchaser under a contract for sale of lots 24 and 25 in the 9th concession of the township of Grimsby.

The facts were set out in certain admissions made in a written memorandum signed by the parties, which, so far as material, were as follows:—

Michael Devine, the then owner of the lands in question, on the 1st October, 1879, mortgaged them to the Canada Loan Company, his wife, Mary Ann Devine, joining in the mortgage for the purpose of barring her dower. The consideration was stated to be \$820, and was to secure \$1,958, repayable in twenty annual instalments of \$97.90 each.

The mortgage provided that the company, on default of payment for one calendar month, might on one week's notice enter on and lease the said lands, and that on default for two months a sale might be effected without any notice. This

proviso also dealt with the mode of service; the application of the proceeds of sale; for selling on credit, buying in, etc.; that the purchaser at any sale thereunder should not be bound to see to the propriety or regularity thereof; and that no want of notice or publication when required thereby should invalidate any sale thereunder, but that the vendors should alone be responsible.

The Ontario Trust Corporation acquired the mortgages of the Canada Loan Company, and under 45 Vict., ch. 78 (O.), were entitled to exercise the powers of sale contained in the mortgages.

Default was made under the said mortgage, and a notice of sale, purporting to be under the said power of sale, was produced by the vendor, dated the 22nd of July, 1881, addressed only to Michael Devine, with proof of service on the same date upon his wife, Mary Ann Devine, but no proof of service on Michael Devine. The lands were advertised for sale, and on May 11th, 1882, were sold by public auction to Joseph Stanton for \$1,400, and a deed, purporting to be made under the power of sale, dated May 18th, 1882, was executed by the company in his favour. The deed recited the mortgage, and that the grantors had acquired the same; the power of sale on one month's default and one week's notice, and that notice had been duly given to Michael Devine and his wife, Mary Ann Devine; but it did not contain any recital with reference to selling on two months' default without notice.

None of the sale papers could be found, with the exception of the notice and declaration of service on Mary Ann Devine, annexed thereto; two sale bills of the auction sale, and a letter from the solicitors of Joseph Stanton to the manager of the company, dated the 19th May, 1882, which were produced by the vendor.

On the 2nd March, 1887, Joseph Stanton conveyed the lands to one Annie Delilah Merritt, wife of Robert Addison Merritt, for \$1500; and on 3rd January, 1893, Annie Delilah Merritt and Robert Addison Merritt mortgaged the said lands to Fanny Gibson and others to secure the sum of \$800. This mortgage was under the Short Form Act, and contained a power of sale in the ordinary statutory form, viz., "That the said mortgagees

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on default of payment for one month, might, on giving one month's notice, enter on and lease or sell the said lands."

Annie Delilah Merritt died intestate on 6th September, 1895, leaving her surviving her husband Robert Addison Merritt and two daughters, Lillie Mabel Merritt and Sarah Agnes Eliza Merritt, both, at the time of her death, being infants. No letters of administration of the property of Annie Delilah Merritt were ever issued. The said daughter Lillie Mabel Merritt attained her majority on the 14th February, 1901, while the other daughter, Sarah Agnes Eliza Merritt, would not attain her majority until the 12th March, 1903. No guardian of the said infants' person or estate was ever appointed, and both daughters were unmarried.

Under various assignments the vendor, on the 19th of April, 1899, became and was the assignee of the said mortgage.

Default was made under the last named mortgage, and, after the expiration of one month, a notice of sale in the proper form, and addressed to Robert Addison Merritt, yeoman, Lillie Mabel Merritt and Sarah Agnes Eliza Merritt, spinsters, all of the township of South Grimsby, in the county of Lincoln, and to all others to whom it might concern, was, on the 1st of June, 1901, served on the said two daughters personally. The said Robert Addison Merritt had left the Province of Ontario, and the service was effected, as to him, by leaving a copy at his last place of residence.

Pursuant to the said notice the lands, after the advertisement, were sold at public auction by the vendor to the purchaser for \$1,280.

The vendor was in possession of the lands, and produced three statutory declarations shewing the purchases by Joseph Stanton and Annie Delilah Merritt and possession by Joseph Stanton and by the Merritts thereunder from the spring or early summer of 1882 to the 12th or 14th day of April, 1899.

The purchaser did not admit the alleged title by possession or the sufficiency of the evidence in support thereof.

The following objections were made to the title:—(1) That it had not been shewn that the power of sale under the Devine mortgage had been validly exercised by reason of the failure to prove that service of the notice of sale was made upon the



mortgagor and his wife. (2) That as to the Merritt mortgage, it was necessary under the Devolution of Estates Act, in exercising the power of sale therein, to serve the legal personal representative of the intestate, Annie Delilah Merritt; and no legal personal representative had been appointed. (3) That assuming that the power of sale could be validly exercised after service upon Robert Addison Merritt and the two daughters of Annie Delilah Merritt, the service upon the said infant alone, without service also for her upon either the official guardian or her father *qua* natural guardian, or guardian in socage, was insufficient.

The application was heard before Meredith, C.J.C.P., in Chambers on the 29th day of November, 1901.

*Kirwan Martin*, for the vendor.

*D'Arcy Tate*, for the purchaser.

December 18. MEREDITH, C.J.:—This is an application under sec. 4 of the Vendors and Purchasers Act (R.S.O. 1897, ch. 134) in respect of the objections of the purchaser to the title, and the parties have agreed on the facts necessary for the determination of the questions raised, and have stated them in a memorandum signed by their respective solicitors.

The first objection is: That it has not been shewn that the power of sale under the Devine mortgage has been validly exercised by reason of the failure to prove that service of the notice of sale was made upon both the mortgagor and his wife.

It was contended by Mr. Martin that this objection was not open to the purchaser because of the provision which the mortgage contains that "No want of notice or publication when required hereby shall invalidate any sale hereunder, but the vendors alone shall be responsible."

The decided cases shew that, notwithstanding the comprehensive words of such a provision, it does not protect a purchaser under a power of sale against defects of which he has notice: *Parkinson v. Hanbury* (1860), 1 Dr. & Sm. 143; *Jenkins v. Jones* (1860), 2 Giff. 99; *Schwyn v. Garfit* (1887), 38 Ch. D. 273; *Bailey v. Barnes*, [1894] 1 Ch. 25; or prevent him from shewing that there are such defects, or if they are

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shewn to exist and are fatal to the exercise of the power, from refusing to complete his purchase: *Life Interest and Reversionary Securities Corporation v. Hand in Hand Fire and Life Ins. Society*, [1898], 2 Ch. 230.

In considering the effect of this provision, it is to be borne in mind that the question in this case does not arise between the mortgagee selling under the Devine mortgage and the purchaser from him, but between a subsequent mortgagee claiming title derived through that purchaser, who has sold under the power of sale contained in his mortgage to the present purchaser, and the present purchaser.

According to the admissions, the conveyance to the purchaser under the Devine mortgage, which was executed on the 2nd March, 1887, contains a recital that notice of the intention to exercise the power of sale was given to the wife of the mortgagor, as well as to the mortgagor himself, and there is nothing to shew that that recital was untrue to the knowledge of the purchaser, or even that it is not in accordance with the fact.

In the absence of evidence of the untruth of the recital, and of the purchaser's knowledge of its untruth, in my opinion it is not open to the present purchaser to question the validity of the sale under the Devine mortgage because of any supposed insufficiency of the notice given of the intention to exercise the power of sale which it contains, for by the terms of the mortgage the want of notice is not to invalidate the sale under the power, and that provision is effectual in the absence of knowledge by the purchaser that sufficient notice had not been given. See *Dicker v. Angerstein* (1876), 3 Ch. D. 600.

If, however, it were open to the purchaser to raise the question, I am of opinion that the objection is not entitled to prevail.

The mortgage was, as I understand, made in pursuance of the Act respecting Short Forms of Mortgages then in force (R.S.O. 1877 ch. 104), and is dated 1st October, 1879, and the power of sale is set out in full in the memorandum of facts; according to the extended meaning to be given to the power, the notice is required to be given to *the mortgagor, his heirs or assigns*.

It is clear that notice to the wife was unnecessary unless she is an assign of the mortgagor within the meaning of the power, and that she is not is, I think, equally clear, for her right to dower is not derived by assignment or transfer from her husband, but is a right conferred on her by law, arising out of the marriage relation and the seisin of the husband.

The first objection is, therefore, in either view not entitled to prevail.

The second objection must also be overruled. The power of sale in the mortgage from Annie Delilah Merritt and her husband under the authority of which the sale to the purchaser is being made, is in form 14 of the schedule to the Act.

The female mortgagor died on the 6th September, 1895, intestate, leaving her husband and two infant children surviving her, and no letters of administration to her estate, real or personal, were ever obtained, and no guardian was appointed for the children.

The notice of exercising the power of sale was served on the surviving husband and the two infant children, the service on the children being personal, and on the husband by leaving a copy of the notice at his last place of residence.

The purchaser's objections are: (1) that the death of the female mortgagor having occurred after the Devolution of Estates Act, R.S.O. 1887, ch. 108, it was necessary to serve not only her heirs but her personal representatives; (2) that service on the infant heirs was insufficient.

In support of the first ground, section 10 of the Devolution of Estates Act was referred to and relied on, as also what is said by Mr. Armour in his work on Titles, 2nd edition, page 363.

I am unable to agree that, in the circumstances of this case, there is any doubt or difficulty created by the provisions of section 10. The equity of redemption in the mortgaged lands at the expiration of a year from the death of the intestate became vested in her heirs at law (section 13), and the notice was served upon the heirs after that vesting took place. It is only while *the estate remains in the personal representatives* of a deceased person that they are to be deemed in law his heirs.

It is true that where the personal representative has not registered a caution, and the estate has become vested in an

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heir at law or devisee, in certain circumstances a caution may yet be registered, which has the effect, as I understand the Act, of divesting the estate out of the heir at law or devisee and again vesting it in the personal representative.

Whatever might have been the case had the notice been served within the year or during the existence of a caution, there can, I think, be no doubt that after the lapse of a year, there having been no caution registered, the heirs at law, using those words in their ordinary sense, were the persons upon whom, according to the terms of the power, the notice was to be served.

Upon whom the notice is to be served is to be determined according to the circumstances existing at the time the notice is given. If authority is needed for this proposition, it may be found in *Re Abbott and Medcalf* (1891), 20 O.R. 299, where it was held by the Chancellor that under a power requiring notice to be served on the assigns of the mortgagor, it was unnecessary to serve an execution creditor of his where execution had been placed in the sheriff's hands after a notice given to those who, at the time it was given, answered the description of assigns.

Service upon the infant heirs was, in my opinion, sufficient service. That it is sufficient to serve the heir, though an infant, where the power is to be exercised on notice to the heir, was the view of the Chancellor (Spragge), as expressed by him in *Bartlett v. Jull* (1880), 28 Gr. 140 at p. 142-3, which accords with the opinion of many of the text writers: Armour on Titles, 2nd ed., p. 364; Bell and Dunn on Mortgages, p. 180; Hunter on Powers of Sale, par. 30; Fisher on Mortgages, 5th ed., par. 955.

As Mr. Tate pointed out, the Revised Statute respecting Mortgages on Real Estate (R.S.O. 1897, ch. 121), provides by its 20th section that if heirs or devisees are infants, the notice is to be given to the executor and administrator as well as to the heirs or devisees, and that notice for an infant heir is to be served upon his guardian, and also upon the infant himself if over the age of twelve years; but that provision has application to the statutory implied power of sale, for which provision is made in that Act, and not to any other power of sale; and the provision does not, therefore, aid in ascertaining what are the requisites



of a notice required to be given to an heir when the heir is an infant, and the question arises on an express power such as that which is in question in this case.

The result is that, in my opinion, all of the objections to the title fail.

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[IN CHAMBERS.]

LOVELL V. COLES.

1902

Jan. 18.

*Writ of Summons—Service Out of Jurisdiction—Contract—Breach of—Traveller.*

The defendant was employed by the plaintiffs, who resided and carried on business in Ontario, to act as their traveller, at an agreed remuneration, in selling and taking orders for their goods over a prescribed route to British Columbia and return, his duties on such return requiring him to call at a number of places in Ontario; to make his report to the plaintiffs, and return his samples. After entering on the performance of the contract, and while in British Columbia, he wrote resigning his position, which the plaintiffs refused to accept, and after allowing a sufficient time to elapse for the performance of the contract, they brought an action in Ontario for the breach of the said contract:—

*Held*, by the Master in Chambers, that the plaintiffs were entitled to maintain the action.

On appeal to STREET, J., the judgment was varied by limiting the action to the breaches which occurred within Ontario, but reserving to the plaintiffs the right to bring actions for the breaches out of Ontario.

THIS was a motion to set aside a writ of summons, an order for the issue thereof, and for the service thereof out of the jurisdiction.

The motion was heard before Mr. Winchester, the Master in Chambers on January 15th, 1902.

*L. F. Stephens*, for the motion.

*R. S. Cassels*, contra.

January 18. THE MASTER IN CHAMBERS:—This is an action brought by the plaintiffs against a former employee for breach of contract.

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The plaintiffs employed the defendant to act as their "traveller" to make what was known as the "fall western trip," that is, to travel over a prescribed route from Toronto to Vancouver and return, such trip to be completed at Toronto, selling the plaintiffs' goods and taking orders for them at a remuneration agreed upon. This employment was entered into at Toronto on the 8th November, 1899.

The defendant, after proceeding on the trip, determined to put the agreement to an end, and on the 13th December, 1899, wrote plaintiffs resigning his position. He had telegraphed shortly before this to the same effect. On the 12th November, 1901, the plaintiffs issued the writ of summons herein, pursuant to an order dated 11th November, 1901. The defendant now moves to set aside the writ of summons, order allowing it to be issued and served, and the statement of claim on the ground that the breach of the contract complained of took place in British Columbia and not within Ontario, and that the rule 162 (*e*) does not apply.

This rule is: "162. Service out of Ontario of a writ or notice of a writ may be allowed by the Court or a Judge wherever . . . (*e*) the action is founded on a breach within Ontario of a contract wherever made, which is to be performed within Ontario. . . ."

For the defendant it is contended that the contract was to be performed outside of Ontario and that the breach took place on the 13th December, 1899, when the defendant wrote resigning his position, and that this letter being posted at Vancouver, B.C., that is the place where the breach took place.

There is no question that the defendant could, if he saw fit, refuse to carry out the contract at British Columbia, or at any other place other than Ontario, and that the plaintiffs could have thereupon have brought their action for the breach on receipt of such letter. Had the plaintiffs so acted, the defendant's objection might have been more formidable. This the plaintiffs did not do, but waited until long after the time within which the defendant should have performed his contract before bringing their action. It is true they refer to the letter of the defendant in the statement of claim, but merely as evidence shewing the breach. But the breach relied upon is the non-fulfilment of

the contract in its entirety. In order to fulfil his contract it appears that the defendant was required to return all his samples to Toronto. He was also to return and give a full verbal report of his trip, and in addition to that he was required to call at least at four places in Ontario which were in the "western trip," viz., Fort William, Port Arthur, Keewatin and Rat Portage. In not doing these things the defendant committed a breach of his contract. Sufficient time has elapsed before the issue of the writ to enable the defendant to perform his contract, and having neglected and refused to perform the same, he is liable to an action for the breach, and the breaches I have referred to are sufficient in my opinion to entitle the plaintiffs to sustain the action in Ontario.

The motion will, therefore, be refused with costs to plaintiffs in any event. Time will be given defendant to enter an appearance and file a statement of defence.

From this judgment the defendant appealed.

*H. L. Drayton*, for the defendant.

*R. S. Cassels*, for the plaintiff.

On January 27th, the appeal was heard by STREET, J., in Chambers, when the judgment of the Master in Chambers was varied by limiting the action to the breaches which occurred in Ontario, and reserving to the plaintiffs the right to bring actions for the breaches which occurred out of the jurisdiction. Costs of the appeal and before the Master to be costs in the cause.

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## [DIVISIONAL COURT.]

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Jan. 18.

## BOOTH v. BOOTH.

*Mechanics' Lien—Contract on two adjoining Buildings—Lien for Work Done on one—Registration—Extent of Work Done.*

Where a contract was made with the respective owners of adjoining lands, on which two separate buildings were erected, but included under one roof, for the repair thereof at one entire price, separate accounts being kept of the work done and materials furnished on each building, a lien attaches, and can be enforced under Mechanics' Lien Act against the lands of each of such owners for the price of the work done and the materials provided on the buildings respectively.

The findings of the local Master, who tried a Mechanics' Lien action, as to the fact of the work being done and the materials furnished within thirty days prior to the lien being registered, and as to the extent of the said work and materials, was upheld, although the evidence was contradictory, there being evidence to support such findings.

This was an action under the Mechanics' Lien Act tried before the local Master, at Belleville, on the 21st October, 1901.

The facts, so far as material, are set out in the judgment of the Divisional Court.

The local Master found in favour of the plaintiff, the lien holder.

From this judgment the defendant, the land owner, appealed to the Divisional Court.

On January 8th, 1902, before a Divisional Court composed of MEREDITH, C.J., and BRITTON, J., the appeal was argued.

*L. A. O'Rourke* for the appellant. The plaintiff's agreement was to do the work on both buildings belonging to different owners for one specific sum. In order to create a lien there should have been a separate contract for each house. The amount expended on each house was, at the most, only a matter of conjecture: Holmsted's Mechanic's Lien Acts, 2nd ed., p. 48. Even if there might have been a lien, it was not registered in time. The last work done on the house was done in February, while the lien here is not dated until the 24th April, and was not registered until the 21st May. The work attempted to be set up as being done in April, was not work properly coming under the contract, but some mere patching. The correction of defects in the work does not come within the statute and extend



the time : *Kelly v. McKenzie* (1884), 1 Man. L.R. 169, cited in Holmested's *Mechanic's Lien Acts*, 2nd ed., p. 127 ; *Summers v. Beard* (1894), 24 O.R. 641.

*H. L. Drayton*, contra. The evidence disclosed a valid contract between the husband and his wife and his mother to do the repairs on both houses for \$886.75. The plaintiff kept an account of what was expended on each house, and therefore there was no difficulty in ascertaining the amount that was due on each, so as to ascertain the amount for which to register the lien. Then as to the time. It is quite clear on the evidence that the work was not completed in February, and that what was done in April was work required by the contract to be done to the house ; and the contract would not have been completed until this work was done. Had the plaintiff done nothing after February the defendant would have had an action against him for the non-completion of the work. Very little work, however, is required to be done to bring it within the terms of the statute : *Irwin v. Beynon* (1887), 4 Man. L.R. 10.

January 18th. MEREDITH, C.J. :—This is an appeal by the land owner in a mechanic's lien proceeding from the judgment of the local Master at Belleville, pronounced at the trial of the action on the 21st October, 1901, in favour of the plaintiff, who is the respondent.

The respondent is the husband of the defendant Jennie A. Booth, and the work and materials for which a lien is claimed upon her lands are alleged to have been performed and furnished in making repairs to a house situate on these lands, which had been damaged by fire.

According to the testimony of the husband and wife, the husband agreed with her and his mother, who owned the adjoining land, upon which there was also a building which had been damaged by the same fire—the two buildings being under the one roof—to repair both of them for \$886.75, which was the amount of the insurance money payable in respect of the loss which had been occasioned by the fire, as settled and adjusted.

Three objections to the judgment are made by the appellant.

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First, that as the agreement was made between the respondent of the one part, and his wife and mother of the other part, for the performance of the whole work necessary to be done on both buildings for one entire price, the Act, R.S.O. 1897, ch. 153, gives no lien upon the land of either for the price of the work and materials, or of any part of them.

In support of this contention, counsel cited and relied on what is said by Mr. Holmsted in his commentary on the Act, 2nd ed., page 48, note (d), and the American cases which are cited in the note.

It is unnecessary to express any opinion as to whether the respondent would have been entitled to a lien under the Act on both the lands of his wife and of his mother for the whole of the agreed price, for the only claim which is made is to a lien on the lands of the wife for the price of the work done on her part of the building and for the materials furnished in respect of it. It was, however, contended that the effect of the bargain, it having been for the whole work at one price, and not at separate prices in respect of each building, is that even such a lien as is claimed was not created.

I am unable to agree with this view. Had it been impossible to distinguish between the work done and materials furnished on the wife's building and those for the building of the mother, there, possibly, might have been a difficulty in the respondent's way; but I see no reason why, if it be practicable to do this, and a *fortiori* where, as appears to have been done in this case, a separate account had been kept, the lien may not attach to the land of each owner for the price of the work performed and materials furnished on his part of the building. I see no reason for giving to the Act such a narrow construction as would leave outside the beneficial provisions of it one who, under such circumstances, has performed work or furnished materials for the construction or repair of a building.

By sec. 4 "any person who performs any work or service upon, or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection . . . , or the appurtenances, . . . shall by virtue thereof have a lien for the price of such work, service or materials upon the erection

. . . and appurtenances thereto, and the lands occupied thereby or enjoyed therewith, or upon, or in respect of which, the said work or service has been performed, or upon which such materials are placed or furnished to be used, limited however in amount to the sum justly due to the person entitled to the lien, and the sum justly owing," and, except in certain cases, "by the owner."

This lien is, by sec. 7, to "attach upon the estate or interest of the owner as defined by this Act in the erection, . . . land . . . and appurtenances thereto, upon or in respect of which the work or service is performed, or the materials placed or furnished to be used, and the lands occupied thereby or enjoyed therewith"; and an owner, as defined by the Act, includes any person having any estate or interest in the lands upon or in respect of which the work or service is performed or materials are placed or furnished: sec. 2, sub-sec. 3.

In my opinion the respondent, upon the findings of the learned Master, brings himself within these provisions.

His work was performed and his materials were furnished at the request and on the credit of his wife; and he is therefore entitled to a lien upon her estate and interest in the lands in respect of which the work was performed and the materials were furnished to be used, for the price of the work and materials, limited to the amount justly due to him by his wife on account of them.

Though the price for the work and materials was a lump sum, and included what was to be paid for that which he contracted to do in respect of his mother's building, I see no reason why, for the purposes of the Act, the price may not be apportioned between the two buildings according to the amount of the work performed and the materials furnished in respect of each.

That it may be done appears to have been the view taken on the provisions of similar statutes by the Courts of at least two States of the neighbouring Union: *Butler v. Rivers* (1856), 4 R.I., 38; *Ballou v. Black* (1885), 17 Neb. 389. See also Phillips on Mechanics' Liens, 3rd ed., sec. 374.

The second objection is that the lien, if it ever existed, had ceased to do so because it was not registered within the time

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prescribed by sec. 22 ; and the action was not begun within the time limited by sec. 23.

The validity of this objection depends upon the time when the work is to be taken to have been completed and the last materials to have been furnished, and as there is evidence to support the conclusion to which the learned Master came, that that time was less than thirty days anterior to the date of the registration of the lien, this objection also fails.

The third objection is to the sufficiency of the evidence to establish the extent of the work done on, and the materials furnished for, the part of the building which belonged to the wife, and the proportion of the whole contract price to be attributed to them.

There was, however, evidence as to all this which, if believed, justified the finding of the Master, and he did believe it.

Though it may be that a finding the other way as to this, and also as to the other facts on which the right to the lien depends, would have been quite as satisfactory as the findings which have been made, that is not sufficient to justify a reversal of the Master's judgment. We can properly reverse it only if we conclude that his findings are wrong, and that I am not prepared to say.

The appeal must, therefore, be dismissed with costs.

*Deegan v. Kilpatrick* (1900), 54 N.Y. App. Div. 374; 66 N.Y. Supp. (100 N.Y. St. Rep.) 628; *Miller v. Schmitt* (1901), 67 N.Y. Supp. (101 N.Y. St. Rep.) 1077; and *Miexell v. Griest* (1895), 40 Pac. Rep. 1070, may be referred to as decisions in favour of the proposition that a lien attaches on the land of both owners where a joint contract is made with them for work to be performed on both lots which are owned separately, though decisions in some States are the other way.

BRITTON, J., concurred.

*Appeal dismissed with costs.*

G. F. H.



[IN CHAMBERS.]

COOKE V. WILSON.

1902

Jan. 21.

*Discovery—Examination—Appointment — Attendance on — Voluntarily Taking Oath—Refusal to Answer Questions—Liability.*

A party to an action who had been served merely with an appointment for her examination for discovery, attended before a special examiner, voluntarily submitted herself for examination, and was sworn :—

*Held*, that she was precluded from setting up, as a ground for her refusal to answer questions submitted to her, that she had not been served with a subpoena.

THIS was a motion for an order directing the plaintiff to attend at her own expense and submit herself for examination.

The motion was argued on January 18th, before Mr. Winchester, the Master in Chambers.

*J. A. Ferguson*, for the motion.

*J. W. McCullough*, contra.

JANUARY 21. THE MASTER IN CHAMBERS :—The defendant upon filing his statement of defence had an appointment issued for the examination of the plaintiff for discovery before a special examiner. The application was duly served upon the plaintiff and her solicitor, and upon its return both attended the office of the special examiner, and she submitted herself for examination by being sworn; but, upon defendant's counsel proceeding to examine her, she refused to answer upon the advice of her counsel, on the grounds that she had not been served with a subpoena.

The defendant now moves before me for an order dismissing this action, on the grounds that the plaintiff improperly refused to answer questions on the examination for discovery.

For the defendant it is contended that the plaintiff having been sworn without objection she is bound to answer all proper questions, and *The Queen v. Flavell* (1884), 14 Q.B.D. 364, is relied on in support of such contention.

For the plaintiff it is contended that she not having been served with the subpoena is not bound to answer, notwithstanding that she has been sworn; and the case *Re Working Men's*

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*Mutual Society* (1882), 21 Ch. D. 831, is referred to as an authority for the position thus taken.

This latter case decides that a witness who has not been paid a sufficient sum for his witness fees and conduct money, may refuse to answer any questions, although sworn, until his fees have been paid.

There is no doubt that the authorities are clear that a witness is entitled to be paid his fees before being compelled to give evidence; and also that he must be served with a subpoena before being bound to attend for examination.

In the present case there was no objection on the ground of non-payment of witness fees, and the witness did attend voluntarily, and took the oath without objection. The question then is, having been sworn, can she refuse to testify, on the ground that no subpoena was served upon her.

In Bacon's Abridgment, tit. Evidence D, it is stated: "If a man, who is not subpoenaed, happens to be in Court during a trial, he shall not be forced to be sworn against his will; but, if he consents, the want of a subpoena is not material, . . ."

And in referring to this statement, Mr. Justice Smith in *The Queen v. Flavell*, 14 Q.B.D. 364, says, at p. 366: "Therefore I should think, as a general rule that if a witness volunteers his evidence and is sworn, and afterwards refuses to answer questions, he is liable to be committed for contempt."

And in the same case, at p. 368, Mr. Justice Hawkins says: "It strikes me that when a witness has entered the witness box and taken the oath, it makes no difference in his duty or liability whether he came there voluntarily or not, in either case he comes before the justices, and is answerable to their jurisdiction. I think it would be mischievous to the last degree if this penalty were held to be applicable only to persons who attend under process, so that a voluntary witness might go into the box and say just so much or so little as he pleased, and shut his mouth directly he thought proper to do so. I do not think that is the law, but in my opinion when a man goes into the witness box and takes the oath, and is sworn to give evidence in the matters relating to the charge he has come before the justices, and they have jurisdiction to compel him, under pain of commitment, to answer relevant questions."

In my opinion the law as enunciated in the above case is applicable to a party submitting himself for examination for discovery in an action, and that the plaintiff herein was wrong in refusing to answer questions properly asked her after she took the oath to give answers to all proper questions asked her.

The order will be that plaintiff do attend at her own expense and submit herself for examination for discovery, and that the defendant do have the costs of this application in any event of the action.

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[DIVISIONAL COURT.]

LEWIS v. DALBY.

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*Security for Costs—Police Constable Acting in Discharge of Duty—R.S.O. 1897, ch. 89.*

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Jan. 31.  
Feb. 19.

The defendants, police constables, who had a warrant for the arrest of a person charged with an offence, entered the house of the plaintiff for the purpose of executing the warrant, acting, as they claimed, under a *bond fide* belief that the person designated in the warrant was in the house, and that they were discharging their duty:—

*Held*, that they came within the provisions of R.S.O. 1897, ch. 89, and were entitled to security for costs.

THIS was an appeal from the judgment of Street, J., affirming an order of the Master in Chambers directing security for the costs of the action to be given by the plaintiff.

The motion was argued before Mr. Winchester, the Master in Chambers, on the 20th January, 1902.

The facts are stated in the judgment of the Master.

*A. F. Lobb*, for the motion.

*B. N. Davis*, contra.

January 27. THE MASTER IN CHAMBERS:—An action brought against four police constables for an alleged trespass

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and assault. The plaintiff claims that on the 18th July, 1900, the defendants illegally and without authority broke into and entered the plaintiff's house and searched the same about two o'clock in the morning, and did violently assault the plaintiff and tear his shirt and remove him out of his house, and that the defendants acted maliciously and without reasonable and probable cause in breaking into his house and assaulting him.

In their defence the defendants state that, pursuant to a warrant dated 17th July, 1900, for the arrest of William Lawson, charged with assault upon the police, the defendants went to the house of plaintiff and stated that they had a warrant for the arrest of Lawson, and asked to be admitted. That the plaintiff refused to admit them, or to say whether the said Lawson was within the said house, thereupon the defendants entered the house, and were told by the plaintiff's wife that the said Lawson lived in the next house south. That the defendants left the said house forthwith. That the defendants had reasonable and probable cause to enter the said house to arrest the said Lawson pursuant to said warrant, and acted throughout the said occurrences without malice.

The defendants now move for an order for security for the costs of the action under the provisions of R.S.O. 1897, ch. 89, and in support of the application the affidavits of the defendants have been filed, the defendant Roe making two affidavits. In his first affidavit he states that he was on the 18th May, 1900, directed to execute a warrant for the arrest of one Lawson for assault upon a police officer; that upon inquiry he was informed that Lawson lived in the fourth house north of the railway track, on Jones Avenue. He proceeds in his affidavit as follows: "I went with my co-defendants to the said house. I knocked, and the plaintiff came to an upper window and asked, 'Who is there?' I replied, 'The police.' He said, 'What do you want?' I said, 'Does Mr. Lawson live there?' He replied, 'It is none of your business; I will not give you any information.' I then said, 'I have a warrant,' and I asked him to open the door. The plaintiff came down to the side door and opened it. I went to the door and produced the warrant, and asked if Lawson was there. The plaintiff said he would tell nothing. I then said I would go in and look, and he



said, 'Look, then, but it may be a dear job for you.' I asked the plaintiff's wife if Lawson lived there. The plaintiff called to her to tell nothing, but she said that we were in the wrong house, that Lawson lived next house to the south. I made an apology for disturbing the plaintiff and his wife." The defendant Roe, in his affidavit, further states: "The plaintiff did not leave the house. There was no assault upon him whatever. I did not lay my hand upon him." This affidavit is corroborated by the affidavits of the other defendants.

The second affidavit of this defendant Roe states the nature of the action and of the defence, and that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment should be given in favour of the defendants, and that the defendants have a good defence on the merits.

The plaintiff has filed several affidavits in answer to the application, in which a number of the statements made by the defendant Roe in his affidavit are contradicted. These affidavits are improper, as the merits of the action cannot be gone into on the present application. What the plaintiff could have done was to cross-examine the defendants on their affidavits if he wished to break down their statements, but this he has not seen fit to do.

A number of cases were cited by counsel for plaintiff to shew that the defendants had acted beyond their authority, and that they are therefore not entitled to take advantage of the statute under which this application is made.

In *Parton v. Williams* (1820), 3 B. & Al. 330, Bayley, J., at p. 335, states that "Where a constable is acting *bonâ fide* and with an honest opinion that he is discharging his duty, and that he is acting at the very time in obedience to the warrant of a magistrate, he is entitled to the protection of the statute passed for the protection of justices of the peace, etc." See also *Bird v. Gunston* (1875), 4 Doug. 275, and *Smith v. Wiltshire*, (1821), 2 B. & B. 619.

I am of opinion that the constables in the present case have complied with the requirements of R.S.O. 1897, ch. 89, and are under the circumstances entitled to the usual order for security for costs under such statute.

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From this judgment the plaintiff appealed to a Judge in Chambers.

January 31. The appeal was heard before STREET, J., who dismissed it with costs, the same counsel appearing.

The plaintiff then appealed to the Divisional Court.

On February 19th, before a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON, J., the appeal was argued.

Davis, for the appellant. The Act, R.S.O. 1897, ch. 89, which provides for security for costs being given in actions brought against magistrates and other officers fulfilling any public duty, only applies where the R.S.O. 1897, ch. 88, the Act for the protection of magistrates and others from vexatious actions, would apply. The latter Act does not apply here, for the act complained of was not done by the defendants in the execution of their duty, as such officers. Their duty was to arrest the person named in the warrant, which did not confer any right to enter the house of a third person and attempt to arrest him: *Hoye v. Bush* (1840), 1 M. & G. 775. [Meredith, C.J.:—If your contention were correct, the statute would be useless, for where a person acts legally he does not require the protection of the statute. The defendants here claim they were acting *bonâ fide* in what they believed to be the discharge of their duty. This is what the statute intends to cover. Had you omitted to give notice of action, and the defendants at the trial should prove they acted *bonâ fide*, would you not be nonsuited?] Probably the plaintiff would fail for want of such notice; but as regards security for costs, a clear *primâ facie* case must be made out, that they were acting under the warrant. The defendants clearly were not acting under the warrant, for they knew perfectly well where the person named in the warrant lived. [Meredith, C.J.:—If, at the trial, you should prove such knowledge in the defendants you would be entitled to succeed. It seems to me that by your having to admit the necessity of giving notice of action, you cannot successfully contend against the giving of security. If you wish to avoid giving security, why not proceed against the defendants in their private capacity, and not as police con-

stables?] The plaintiff is entitled to maintain his action against the defendants as police constables, for it was in that capacity they committed the illegal act complained of.

*Lobb*, for the respondents, was not called upon.

MEREDITH, C.J.—It is not necessary to deal further with this case. We are clearly of the opinion that the defendants come with the provisions of the R.S.O. 1897, ch. 89, and are, therefore, entitled to security for costs.

The order appealed against must, therefore, be affirmed, and the appeal dismissed with costs.

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[DIVISIONAL COURT.]

DODGE V. SMITH.

1902

*Estoppel—Deed—Privies in Estate—Reservation in Deed—Action not based on Deed set up as Estoppel.*

Jan. 17.

A person who had acquired title by possession to certain lands nevertheless afterwards took a conveyance from the owner by paper title for an expressed consideration of \$900, reserving to the grantor the mines and minerals, and gave a mortgage back for \$300 "saving and excepting the mines which said mortgagor has no claim to":—

*Held*, that this did not revert the mines in the grantor, nor was a subsequent owner estopped by the exception in the mortgage from claiming the mines as against one deriving title from the grantor, the action not being based on the mortgage, but being wholly collateral to it.

MOTION by the defendants to the Divisional Court by way of appeal from the judgment of Lount, J., pronounced after the trial of this action before him without a jury, at Kingston, on June 21st, 1901.

The plaintiffs claimed title to the mines and minerals under certain lands and brought the present action to restrain the defendants from trespassing upon their rights by working the said mines, and for damages for trespasses committed in working them.

The lands in question were granted by the Crown to Edwin Dodge by two patents dated respectively August 26th, 1864,

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for one parcel, and February 13th, 1866, for the other parcel. These grants reserve to the Crown the mines of gold and silver.

On April 25th, 1877, Edwin Dodge conveyed the land in fee to Edwin G. Dodge. On July 10th, 1884, Edwin G. Dodge executed a conveyance in fee simple to Patrick Murphy for the consideration of \$900 of the lands in question "reserving and excepting thereout and therefrom all mines and minerals and ores of every kind and description in, upon, over, or under said lands, and also free and uninterrupted access, ingress, and regress and egress to, over and upon and from said lands for the purpose of mining, digging, or erecting machinery for the purpose of getting out said mines and minerals." This conveyance contained the usual statutory covenants for title, and no recitals, and it is not executed by Murphy. On the same day the grantee, Patrick Murphy, made a mortgage back to Edwin G. Dodge for \$300 upon the same land, "saving and excepting the mines which said mortgagor has no claim to." The plaintiffs are the persons entitled under the will of Edwin G. Dodge and they claim that he was entitled to both land and mines at the time he conveyed the land to Murphy, and that the mines were reserved to him and have passed to them under his will, and certain subsequent transfers of the title passing under it. The mortgage from Murphy to Dodge, which was for part of the purchase money, has been paid.

The defendants claim title under Patrick Murphy to both the land and the mines, alleging that he had acquired a title in fee simple by length of possession before the conveyance from Dodge to him in July, 1884, which was not affected by the conveyance from Dodge and the mortgage back.

The learned Judge, at the conclusion of the evidence, found that at the time of the conveyance from Dodge to Murphy the latter had already been upwards of ten years in actual and continuous possession of the land in question and had acquired a possessory title thereto, but that he and those claiming under him were estopped by the exceptions of the mines in the deed and mortgage from claiming title to the mines. He therefore granted the injunction asked for, assessed the damages at \$5, and ordered the defendants to pay the costs.



From this judgment the defendants appealed to the Divisional Court and their appeal was argued on December 12th, 1901, before FALCONBRIDGE, C.J.K.B., and STREET, J.

*G. H. Watson, K.C.*, for the defendants, referred on the subject of estoppel to *Robertson v. Pickrell* (1883), 109 U.S. 608, 616; *Marsh v. Webb* (1891), 21 O.R. 281; *Re Bain and Leslie* (1894), 25 O.R. 136; *Brock v. Benness* (1898), 29 O.R. 468; *Foott v. Rice* (1883), 4 O.R. 94; *Gordon v. Proctor* (1890), 20 O.R. 53; Bigelow on Estoppel, 5th ed., p. 356.

*J. M. McWhinney* and *S. B. Woods*, for the plaintiffs, contended that prior to 1884 there had been no such possession by Patrick Murphy as was necessary to give him a title to the mineral lands in question; that as between the parties to the deed and mortgage of 1884 and those claiming under them, they were estopped from contradicting anything in those documents: *Fitch v. Baldwin* (1819), 17 Johns. (N.Y.) 161; *Jackson v. Ayers* (1817), 14 Johns. (N.Y.) 223; *Bowman v. Taylor* (1834), 7 A. & E. 278, at p. 291; *Carver v. Jackson* (1830), 4 Peters (U.S.) 1; *Gray v. Richford* (1878), 2 S.C.R. 431; *Small v. Thompson* (1897), 28 S.C.R. 219; that Murphy was not obliged to take advantage of a statutory right, but could waive it: *Banning on Limitations*, 2nd ed., p. 106; R.S.O. 1897, ch. 133, sec. 5, sub-sec. 10; that in 1884 there was a severance between the mines and the surface of the lands, and that after that date no right of possession of the surface would give title to the mines: *Agency Company v. Short* (1888), 13 App. Cas. 793; *Willis v. Earl Howe*, [1893] 2 Ch. 545; *Bainbridge on the Law of Mines*, 5th ed., at p. 39.

*Watson*, in reply, contended that there was certainly no attempt at severance until the deeds of 1884, and that they did not create a severance; and that this action was not founded on the deed or the mortgage of 1884, but the plaintiff's right rested on the original grant from the Crown.

January 17. STREET, J. [after stating the facts as above]:—At the date of the conveyance of July 10th, 1884, from Dodge to Murphy, and of the mortgage back of the same date, it is plain that the title of Dodge to the land and the mines under it had been extinguished by the possession of Murphy for the

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statutory period; and that Murphy, by virtue of his possession, had acquired a good title to both land and mines as against Dodge. The plaintiffs assert that by virtue of the transaction which then took place, the mines became revested in Dodge, and have ever since remained his property and the property of those claiming under him.

If the mines then became revested in him, the authorities shew that having become separated, by the terms of the deeds, from the surface, the subsequent possession of the surface by Murphy and those claiming under him has not again extinguished the right to the mines: *Seaman v. Vawdrey* (1810), 16 Ves. 390; *Smith v. Lloyd* (1854), 9 Ex. 562. But I can find nothing in the conveyances or in the circumstances of the case which had the effect of revesting the mines in Dodge, or which can estop the defendants, who claim under Murphy, from asserting the title which he undoubtedly possessed to the mines down to the time of the transaction with Dodge in 1884. His motive in entering into that transaction and paying Dodge \$900 does not appear, and is not here in question. When Dodge reserved the mines from his grant to Murphy, he reserved something which he did not own, because his title to it had already become barred by the statute, and it is plain that the reservation did not operate as a grant from Murphy. The mortgage revested the title to the land in Dodge for its duration, but did not affect the mines. The plaintiffs rely upon the words of the exception at the end of the description of the land in the mortgage: "Saving and excepting the mines which the mortgagor has no claim to." Whatever might be the effect of these words if this were an action between the parties to the mortgage or their privies, upon the mortgage itself, I think it is clear that they can have no operation as an estoppel against the defendants in the present action, which is not based upon the mortgage but wholly collateral to it. They are properly referred to as evidence in the plaintiffs' favour, but they are not conclusive, and may be and have been shewn to be incorrect: *Carpenter v. Buller* (1841), 8 M. & W. 209; *Ex parte Morgan, In re Simpson* (1875), 2 Ch. D. 72, at p. 89.

In my opinion the judgment entered for the plaintiffs should be set aside, and the action dismissed with costs; and the plaintiffs should pay the costs of the present appeal.

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Jan. 27.

*Municipal Corporations—Tax Sale—Power of Treasurer—Advertising Expenses*  
—R.S.O. 1897, ch. 224, sec. 224.

A treasurer of a town has no authority to bind the municipal corporation by a contract to pay the cost of advertising his list of lands for sale for arrears of taxes. Under the Assessment Act, R.S.O. 1897, ch. 224, sec. 224, he is only *persona designata* to act on behalf of the municipality, and the municipality has no authority to interfere with him in the performance of such defined duties. A creditor in respect to the publication of such advertisements must look to him personally.

*Warwick v. The County of Simcoe* (1900), 36 C.L.J. 461, approved of and followed.

THIS action was brought by the plaintiffs as assignees of an alleged claim of The Leader and Recorder Publishing Company against the town of Toronto Junction in respect to certain advertisements relating to tax sales, and was tried before Ferguson, J., at the non-jury sittings at Toronto, on October 9th, 1901. The facts of the case are sufficiently stated in the judgment.

W. H. Blake, for the plaintiffs.

C. C. Going, for the defendants.

The only cases referred to in reference to the point upon which the judgment turns, were *Warwick v. The County of Simcoe* (1900), 36 C.L.J. 461; *McSorley v. Mayor, etc., of the City of St. John* (1882), 6 S.C.R. 531, especially at p. 559.

January 27. FERGUSON, J.:—The plaintiffs allege that the defendants invited tenders for the publication of a tax

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sale advertisement, and that the tender of The York Leader and Recorder Publishing Company, Limited, at the price of eighty cents per lot, was on or about March 5th, 1900, accepted by the defendants. They, the plaintiffs, say that the advertisement was duly published as agreed, and that there is due from the defendants under their contract the sum of \$462.50; that on or about March 5th, 1900, the company assigned to the plaintiffs the amount then to become payable under the said contract; and that the defendants were duly notified of the assignment, and promised and agreed in writing to pay to the plaintiffs the amount payable under the contract when the same should become due. The plaintiffs then allege generally performance of conditions precedent, and a refusal on the part of the defendants to pay. They claim payment of the sum of \$462.50 with interest from March 4th, 1901, and costs of the action.

The defendants say that they did not either invite or accept tenders for the publication of the tax sale advertisement referred to by the plaintiffs, and that if any agreement was made with the said publishing company (which they do not admit, but deny), it was made by the defendants' treasurer under the provisions of the Assessment Act, and that they, the defendants, are not responsible in respect of it. The defendants further say that the advertisement, though furnished to the company in accurate form, was published with so many errors as to be absolutely valueless, and that there was, therefore, a total failure of consideration. The defendants ask a dismissal of the action with costs.

The evidence shews that on March 5th, 1900, the company was indebted to the plaintiffs in the sum of \$1,800, and that the plaintiffs received from the manager of the company, Mr. Fawcett, the assignment alleged. This assignment is in the form of a letter bearing date the 5th day of March, 1900, from the company by Fawcett, then general manager, to Mr. Jackson, the treasurer of the town of Toronto Junction, requesting him to "pay whatever the amount of the account of the tax sale advertising might be for the present year to the plaintiffs," the letter going on to state in a general way how the money was to be applied when received. On this letter there is a



memorandum of the same date signed by Jackson, the treasurer of the town, in these words: "Whatever amount may become due The Leader and Recorder for advertising tax sale for 1900 will be paid by me to the Canadian Bank of Commerce."

The manuscript of the required advertisement was given the company by the treasurer, Jackson, in due and accurate form. A proof sheet or proof sheets were given or sent to the treasurer for examination. This did not accord with the manuscript given the company. By some accident in the setting of the types or otherwise, fifty-six of the lots were misplaced with regard to the amounts that should appear opposite them, respectively. The treasurer, though he made some slight changes in the proof, did not observe this very great error, nor did the publishing company, so far as disclosed. The company went on publishing the advertisement in this erroneous form.

This company were in difficulties, and on June 9th, 1900, a winding-up order was made against them in the county court of the county of York. This order appointed Mr. Jennings liquidator, and stated that he should be at liberty to continue the publication of the paper for such time as should seem to him in the interest of the liquidation, or "until further order."

On the 22nd day of June another winding-up order was made in the High Court. It appears that by this order the proceedings under the former order were perpetually stayed. By this order Mr. Postlethwaite was appointed provisional liquidator. The order states that this liquidator was to be at liberty to continue the publication of the paper and to carry on the business of the company until a permanent liquidator should be appointed, or until further order, and that the permanent liquidator when appointed should be at liberty to continue the publication of the paper for such time as the special referee to whom the matter had been referred should find to be in the interest of the liquidation, or until further order. Mr. Postlethwaite became also the permanent liquidator.

The treasurer, Mr. Jackson, appears to have become uneasy and anxious lest the publication of the advertisement should not be continued and completed, and, as he says in his evidence, he went to each of the liquidators and made enquiries on the subject. He says that each offered the opinion that it would,

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but declined to give him any undertaking or assurance that it would, and in these circumstances he got his manuscript from Fawcett and took the work to the other newspaper, paying one dollar per lot instead of the eighty cents. The work was done by this other paper, and the sale of the lands proceeded with accordingly. It appears also that the publication of the advertisement in the erroneous form in which it was proceeded with by the liquidator, with the required number of insertions in the paper, took place.

On September 29th, 1900, the bank, having been advised by the company that they had completed the contract, and that an account had been rendered through their manager by letter demanded payment of the amount, \$462.50, from Jackson, the treasurer of the town, according to the undertaking given by him on March 5th, 1900, stating as above that "whatever amount may become due to The Leader and Recorder for advertising tax sales for 1900 will be paid by him to the Bank of Commerce;" and to this the treasurer, Jackson, replied by stating that no amount whatever was due to The Leader and Recorder; and, on March 4th, 1901, this action is brought, not against the treasurer, but against the town to recover this sum. There has been no by-law or resolution of the council regarding this matter, nor has the town made any contract in respect of it.

I have written the foregoing chiefly for the purpose of shewing with some degree of precision what the facts were. If the action had been brought against the treasurer, questions of some gravity might arise as to whether or not there could be a recovery, but in the view that I have taken in respect of another part or element of the case, I need not concern myself with these. For the purposes of the collection of arrears of taxes the 224th section of the Assessment Act, R.S.O. 1897, ch. 224, provides that the treasurer and mayor of every city or town shall perform the like duties as are (in the Act) before, in the case of other municipalities, imposed on the county treasurer and warden, respectively. In this case the warrant was issued by the mayor of the town. The case *Warwick v. The County of Simcoe*, decided by the learned Judge of the county court of the county of York, and reported in 36 C.L.J. 461, has a very

strong bearing on the present one, although plaintiffs' counsel pointed out and contended that it is distinguishable in one respect. I have perused the judgment of the learned county court Judge, and I am prepared to say that I entirely agree with him. The head note of that case is this:

"A county municipality is not liable for the cost of advertising the county treasurer's list of lands for sale for arrears of taxes, although sent to the plaintiff by the county treasurer.

"The county treasurer does not act as an officer of the corporation in relation to tax sales, and the duties connected therewith are not within the scope of his authority as county treasurer. He is merely *persona designata* on behalf of the local municipalities, and a creditor must look to him personally."

The distinction sought to be made between the case *Warwick v. County of Simcoe* above referred to and the present case is that there the treasurer was the person designated by the statute to act on behalf of the local municipalities, but here the treasurer was the person so designated on behalf of the one municipality.

I do not think this a sound distinction. Section 224 of the Act provides that he shall perform the like duties as those imposed upon the county treasurer. The duties imposed by the statute, at least so far as the purposes of this action here are concerned, are the same. In each case the treasurer is an officer pointed out by the Legislature, and commanded to perform certain duties for the general good, and in neither case can the municipality interfere with the officer in the performance of these defined duties.

The treasurer in the present case did not at any time, so far as the evidence shews, attempt to pledge the credit of the defendant municipality. I am of the opinion that he had no power to do so. A perusal of the documents in evidence shews that the treasurer from first to last acted for himself, and not for another. I cannot think that there is any legal ground for charging these expenses of this printing against the defendant municipality, even if it were assumed that they constituted a valid claim against the treasurer, and I think the action should be dismissed with costs.

*Action dismissed with costs.*

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## [DIVISIONAL COURT.]

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MORPHY V. COLWELL.

Feb. 19.

*Bankruptcy and Insolvency—Transfer by Insolvent Debtor—Attacking—Time—Division Court Proceeding—Collateral Inquiry—Pressure—Evidence of.*

A garnishee summons was issued from a Division Court on the 22nd January, 1900, wherein the primary creditor claimed from the primary debtor \$200 upon a due bill, and whereby all debts due from an insurance company to the primary debtor were attached. The primary debtor had recovered a judgment against the insurance company on the 7th December, 1899, and had assigned the judgment on the same day to the claimant. No formal notice of the proceedings in the division court or of any contest as to his rights was ever given to the claimant, but he appeared in the proceedings on the 6th July, 1900, and consented to an adjournment of them, and afterwards appeared again before the Judge, when his rights under the assignment were tried, and judgment was given against him setting aside the assignment as an unjust preference:—

*Held*, on appeal, that the transfer to the claimant was not attacked when the summons was issued, nor until the claimant appeared in the proceedings, and, therefore, it was not attacked within sixty days, and its validity could be supported by proof of pressure in procuring it.

*Held*, also, FALCONBRIDGE, C.J., dissenting, that, as it appeared from the evidence both of the primary debtor and the claimant, that the latter had asked the former for security shortly before the security was given, and that the security given was that which was promised, there was pressure inducing the giving of the security, and it should be upheld, notwithstanding that the claimant was merely liable for a debt of the primary debtor which it was expected he should pay, as he did, and notwithstanding that he was not present at the time the assignment was made to him, it having been drawn by his solicitor.

*Molsons Bank v. Halter* (1890), 18 S.C.R. 88, and *Stevens v. McArthur* (1891), 19 S.C.R. 446, followed.

APPEAL by the claimant, J. D. Smith, from an order of the Judge presiding in the 1st division court in the county of Middlesex refusing a new trial, and thereby affirming his own judgment setting aside, as an unjust preference, a transfer to the claimant from Colwell, the primary debtor, of a claim against the Northern Life Assurance Company, the garnishees.

The summons was issued in the division court on the 22nd January, 1900: the primary creditor, Morphy, claimed from the primary debtor, Colwell, the sum of \$200 upon a due bill dated the 1st March, 1894; and all debts due from the Northern Life Assurance Company to Colwell were attached.

On the 7th December, 1899, Colwell had recovered a judgment against the garnishees for \$450, and on the same day he assigned that judgment to J. D. Smith, the present appellant.



There was nothing to shew that any formal notice of the proceedings, or of any contest as to his rights, was ever served upon Smith; but he appeared in the proceedings, by his solicitor, on the 6th July, 1900, and consented to an adjournment of them, and upon the hearing of evidence, which took place between all the parties and for all the purposes of their contest between themselves, on the 24th October, 1900.

The Judge, after hearing the evidence, held that, the commencement of the action having been within sixty days after the transfer to the claimant, the proceedings to set aside the assignment must be taken to have then begun, although the claimant was not made a party to them; that, in any event, there was no evidence that the assignment was the result of pressure; and he gave judgment for the primary creditor against the primary debtor for \$200 and costs, and against the garnishees for \$200 and the costs.

The claimant applied to the Judge for a new trial, and, upon his application being refused, he appealed to the High Court.

The appeal was heard on the 23rd January, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ.

*W. H. Blake*, for the appellant, referred to *Cole v. Porteous* (1892), 19 A.R. 111; sec. 202 of the Division Courts Act, R.S.O. 1897, ch. 60; Bicknell and Seager's Division Courts Act, 2nd ed., pp. 357, 361; *Vyse v. Brown* (1884), 13 Q.B.D. 199; sec. 10, sub-sec. 3, of the Assignments Act, R.S.O. 1897, ch. 147; Cassels on the Assignments Act, 3rd ed., p. 59 *et seq.*; *Donohue v. Hull* (1895), 24 S.C.R. 684, at p. 688; *Beattie v. Holmes* (1898), 29 O.R. 264; *Re Perras v. Keefer* (1892), 22 O.R. 672; Division Court Rule 77 and Form 149; *Re Thompson* (1895-6), 17 P.R. 109.

*J. M. McEvoy*, for the primary creditor, cited *Gignac v. Iler* (1898), 29 O.R. 147 (affirmed in 25 A.R. 393).

February 19. STREET, J. (after setting out the facts as above):—The learned Judge in the court below has held that, because the garnishee summons was issued against the primary debtor and the garnishee within sixty days of the making of

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the transfer in question, the transfer must be held to have been attacked within the sixty days, and, consequently, that its validity cannot be supported by proof of pressure in procuring it.

In this view I am unable to concur. The transfer cannot be taken to have been attacked until proceedings against the transferee for the purpose were begun, and there is not the slightest evidence that the transferee here, J. D. Smith, was in any way notified of the proceedings, or made a party to them, until he appeared in them, by his solicitor, on the 6th July, 1900, the transfer in question having been made in the previous December. I am of opinion, therefore, that we must hold that no proceedings to impeach or set aside the transfer were made until after the expiration of the statutory period of sixty days.

Then the question arises whether there is evidence of pressure by the claimant sufficient to enable us to hold upon the authorities that the preference obtained by the claimant was not a mere voluntary act, and therefore an unjust preference under the Act.

The learned Judge below thinks the evidence upon the question of pressure is very unsatisfactory: he would give no weight to the evidence of the debtor, Colwell, if it stood alone; he appears to think that the debtor's evidence and that of the claimant are at variance as to what took place; but the evidence which he has certified to us does not seem to bear this out. Smith, it appears, was indorser for Colwell upon a note in the bank for \$250, which he has since paid.

He says: "I have an assignment of a judgment against the garnishees in favour of the primary debtor. I asked Colwell for this in case judgment went in his favour. I asked him in my own house. He said it was the only thing he had left to take up that note with, and, if judgment did not go in his favour, I would have to take it up myself. . . All the money I paid was after the assignment; there was no money owing to me by Colwell at date of assignment."

Colwell says: "Mr. Smith was urging me for payment, and I told him if I succeeded in my suit against the insurance company, I would pay him; he pressed me for security. I recollect a conversation with claimant a day or two before the trial. . .

Note was not due at time of assignment; the only reason why I did not make an assignment before was that I was looking for a settlement."

There does not appear to be any discrepancy of a material character between these two stories, and the learned Judge does not appear to discredit the story told by the claimant, but only to think that it is unsatisfactory because of its not entering more fully into dates and other matters of detail. I think, however, there is sufficient in his evidence, treating it as worthy of credit, and, leaving aside that of Colwell when it does not agree with it, to require us to hold that the assignment to Smith of the judgment against the insurance company was not the mere voluntary act of Colwell, but was the result of a request made by Smith for the particular security which he finally obtained. Smith's position in this respect is not impaired by the fact that he was merely liable for a debt of Colwell's which it was expected he should pay, as he did. Nor is the fact that Smith was not present at the time the assignment was made to him a material circumstance, the assignment having been drawn up by his solicitor.

In short, it appears from the evidence both of Smith and Colwell that Smith had asked Colwell for security shortly before the security was given, and that the security given was that which was promised. This, I think, is sufficient, upon the authorities, to constitute pressure inducing the giving of the security: *Molsons Bank v. Halter* (1890), 18 S.C.R. 88; *Stephens v. McArthur* (1891), 19 S.C.R. 446.

The result is that the claimant should be held entitled to be paid his debt first out of the moneys realized from the judgment which has been assigned to him. He has paid, it appears, \$263.61, and he will be entitled to interest upon this sum and to his costs here and below. This, however, will leave a considerable surplus, for the insurance company was liable to pay \$450 and interest and costs, and it appears they have actually paid over the sum of \$475 upon an undertaking. The primary creditor will be entitled to judgment against them for the surplus over Smith's claim. The parties should be able to settle the figures for insertion in the judgment. If not, further reference may be had to us for the purpose.

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BRITTON, J.:—I agree.

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FALCONBRIDGE, C.J.:—I agree with my brother Street in his conclusion as to the application of the sixty days' rule and its result on the burthen of proof.

But, conceding this point to the appellant, I do not agree in holding the learned Judge in the court below to have been wrong in his findings of fact. He had ample ground for saying that he did not believe the evidence put forward to support the pressure, and his judgment ought not to be reversed because he has not said so in express terms.

In my opinion, the appeal ought to be dismissed.

E. B. B.

## [DIVISIONAL COURT.]

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## BELLING V. CITY OF HAMILTON.

Feb. 15.

*Way—Injury to Pedestrian—Defect in Carriageway—Liability of Municipality—Findings of Trial Judge.*

The plaintiff, in crossing at night on foot a busy street in a city, did so at a point thirty feet distant from the crossing, proceeding in a diagonal direction across the carriageway. There was a hole or depression in the asphalt pavement from  $1\frac{1}{2}$  to  $1\frac{3}{4}$  inches deep at its deepest part, and the plaintiff slipped upon the edge and was injured. In an action against the city corporation for damages for negligence, the trial Judge found that the accident was caused by the defendants' negligence in allowing the pavement to be and remain dangerously out of repair; that the plaintiff was not guilty of contributory negligence in crossing the street diagonally; that the street was not sufficiently out of repair to be dangerous to horses or vehicles; and assessed damages to the plaintiff.

*Held*, FALCONBRIDGE, C.J., dissenting, that the plaintiff, using the carriageway when on foot, had no right to expect a higher degree of repair than would render the way reasonably safe for vehicles; and the last finding of the Judge put the plaintiff out of court.

*Boss v. Litton* (1832), 5 C. & P. 407, explained and distinguished.

*Semble*, *per* STREET, J., that the defect in question was not one from which a reasonable man would have apprehended danger to any person either on foot or in a carriage, and therefore the corporation could not be guilty of negligence in regard to it.

*Per* FALCONBRIDGE, C.J., that the judgment ought to be upheld, as it was a question of fact, not of law, whether the depression was an actionable defect in the highway.



THIS was an action in the county court of the county of Wentworth brought by a married woman against the corporation of the city of Hamilton to recover damages for injuries received by the plaintiff by a fall upon the asphalt pavement of MacNab street in that city, owing, as alleged, to the negligence of the defendants in permitting the roadway to be in a defective and dangerous condition.

The facts, as found by the Judge of the county court, who tried the action without a jury, were set out by him in a written opinion as follows:—

The plaintiff's accident was, I find, due to and caused by the defendants' negligence in allowing the pavement on MacNab street, between the market and King street, to be and remain dangerously out of repair, that is, dangerous considering the fact that it is one of the busiest streets in Hamilton, over which hundreds of people are daily hurrying in all directions.

Then, was the plaintiff guilty of contributory negligence in leaving the regular crossing, or rather, leaving that portion of the street pavement crossing MacNab street in a straight line with the sidewalk, along the south side of Market street? She "took a short cut," crossing diagonally to the place further down and on the opposite side of MacNab street. She often did this, as others appear to have also done. The pavement at the regular crossing place was in good repair and well lighted. Where she crossed there was a hole and it was not so well lighted. At the trial I felt that the plaintiff had taken chances of injury unnecessarily by departing from the regular crossing, and that probably, under the circumstances, she should be held guilty of contributory negligence of such a nature as to disentitle her to succeed. The roadway was not sufficiently out of repair to be at all dangerous to horses and vehicles. On referring to the numerous authorities which counsel for the plaintiff cited, I think it is clearly the plaintiff's right to walk in the road if more convenient for her, and that leaving the regular sidewalk or crossing as she did is not *per se* such want of care as to preclude her right to recover. This is all the evidence of negligence which, in my opinion, there is in this case. I do not think that either the nature or location of the street or the condition of light was such as to give the act,

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under the circumstances which existed, the character of recklessness. It was the natural and usual thing for many persons to do at that particular part of the city.

I therefore feel that, in following, as I must, the authorities on this point, I cannot find the plaintiff guilty of contributory negligence:—Am. & Eng. Encyc. of Law, 2nd ed., vol. 15, p. 466, 473; note to *Ely v. City of Des Moines* (1892), 17 L.R.A. 124, on "Contributory negligence of traveller in deviating from usual thoroughfare;" Shearman & Redfield, 5th ed., vol. 1, pp. 602, 655, 658; Elliott on Roads and Streets, 2nd ed., p. 911, and cases cited; *Hopkins v. Town of Owen Sound* (1895), 27 O.R. 43.

For these reason, I think there should be a judgment for the plaintiff, and, in my opinion, \$150 would be a fair and reasonable sum for loss and suffering. I therefore direct judgment to be entered for the plaintiff for \$150 damages and costs.

Counsel for the defendants admitted at the trial that the notice required by the Municipal Act, sec. 606, sub-sec. 3, had been duly given.

The defendants appealed from this decision, and their appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ., on the 6th November, 1901.

*J. P. Stanton*, for the defendants, cited *Ewing v. City of Toronto* (1898), 29 O.R. 197, 201; *Ince v. City of Toronto* (1901), 31 S.C.R. 323; *Burroughs v. City of Milwaukee* (1901), 86 N.W. Rep. 159.

*J. H. Long*, for the plaintiff, relied on the authorities referred to in the judgment appealed against and on Beven on Negligence, 2nd ed., vol. 1, p. 659; Biggar's Municipal Manual, p. 833 *et seq.*; *Ricketts v. Village of Markdale* (1899-1900), 31 O.R. 180, 610; Thompson on Highways, ed. of 1881, p. 441.

February 15. FALCONBRIDGE, C.J.:—Inasmuch as the municipalities have secured legislation (to which they would seem to be nowise better entitled than railway or insurance companies or any other corporations) transferring the trial of certain actions of negligence from a jury to the Judge, it seems to me that the finding of fact of their chosen tribunal ought to

be viewed with at least as much respect as that which is accorded to the finding of a jury.

And unless we are prepared to hold as a matter of law that the depression or hole which existed here was not an actionable defect in the highway, the judgment ought to be upheld.

I do not know of any Canadian case which would compel us so to hold. There is at least one in the United States which would probably go that far (*Burroughs v. City of Milwaukee*, 86 N.W. Rep. 159); but, in considering these authorities, regard must always be had to the law relating to, and standard of maintenance of, highways of the particular place or state.

I do not feel called on to generalize further in the present case.

Whether the plaintiff using the highway was in the exercise of ordinary care was also a question of fact for the Judge. Proceeding on a way known to be defective is not necessarily inconsistent with reasonable care. A pedestrian is not guilty of negligence merely because he walks on the roadway; and he may cross a street at any point without waiting to reach a crossing: *Boss v. Litton* (1832), 5 C. & P. 407; Beven on Negligence, 2nd ed., vol. 1, p. 659; Thompson on Highways, 1881, p. 441.

In my opinion, the appeal ought to be dismissed with costs.

STREET, J.:—This was an appeal by the defendants to the Divisional Court from a judgment of the Judge of the county court of Wentworth, in an action in his court tried before him without a jury, awarding \$150 damages to the plaintiff. The plaintiff, a married women, on the night of the 29th December, 1900, was crossing MacNab street in the city of Hamilton, at a point some thirty feet distant from the crossing, in a diagonal direction across the carriageway. She stated in her evidence that about the middle of the roadway she slipped upon the edge of a hole in the asphalt with which the street was paved; that the hole in question, to the best of her belief, was about two feet square and about two inches deep, as near as she could judge, and that it had ragged edges. The trial took place on the 13th April, 1901, and she said the hole was still there, but that she had not seen it before the accident, and she could not

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say that there were any other holes in the pavement at the time of the accident; her husband spoke of there being another similar hole in the pavement at the time of the accident, within about ninety feet of it, and he said that the hole in which his wife slipped was exactly  $1\frac{7}{8}$  inches in depth at the time of the trial. The assistant city engineer was called for the defence, and swore that the hole in question was a depression in the asphalt about 2 feet in diameter and  $1\frac{3}{4}$  inches deep in the centre, and sloped up to nothing at its edges; that it was 19 feet from the curb and 31 feet away from the place where persons were in the habit of crossing the street, and that on the 17th January, when he measured it, it was the only hole on the street. It appeared from the further evidence for the defence that in the autumn of 1899 the Bell Telephone Company had put a trench in the street and filled it in, and that the asphalt contractors in November, 1899, had put in fresh concrete and an asphalt surface over the trench, and that the hole or depression in question was near the line of the trench and appeared to have been caused by a slight subsidence of the filling underneath. He further said that no repairs to an asphalt road such as this could be made between the 1st November and the 1st May, as a rule, on account of the frost.

The learned Judge found "that the plaintiff's accident was due to and caused by the defendants' negligence in allowing the pavement on MacNab street to be and remain dangerously out of repair, considering the fact that it is one of the busiest streets in Hamilton, over which hundreds of people are daily hurrying in all directions." He found that she was not guilty of contributory negligence in crossing the street in a diagonal manner; *he found that the street was not sufficiently out of repair to be at all dangerous to horses or vehicles*; and he assessed the damages at \$150.

The defendants appealed to the Divisional Court.

It has been well settled by a long line of cases that the duty imposed upon municipalities in this Province by the Municipal Act is to keep the highways under their control in a reasonable state of repair, having regard to their situation and the travel upon them. This duty has been expressed in many forms of words, but the meaning to be gathered from all of them is that



the highway should be kept in such a state of repair as that persons using it might reasonably expect to be able to do so without danger: *Castor v. Township of Uxbridge* (1876), 39 U.C.R. 113; *Lucas v. Township of Moore* (1879), 3 A.R. 602; *Foley v. Township of East Flamborough* (1898), 29 O.R. 139.\*

The municipality is not required to keep it in *perfect* repair, and is not required to insure the safety of persons using it. The question we have to consider is whether the municipality of the city of Hamilton have failed in their duty in the present case. The learned county court Judge by whom the action was tried without a jury has found them guilty of negligence "in allowing the pavement to be dangerously out of repair" at the point in question, though he further finds that the street was not dangerous for vehicles. This finding of fact of the learned Judge who heard the evidence is, of course, to be treated with great respect, but in the present case we are not embarrassed in considering it by any conflict of evidence upon the really material questions which we are called on to discuss. Besides which, the Courts are in the habit of more freely reviewing the findings of fact in cases tried by a Judge alone than in cases tried with a jury, for this good reason, amongst others, that a reversal of the findings of a Judge does not render it necessary to send the parties back to the expense and uncertainty of another trial; and I can see no good reason why we should hesitate more to review the judgment of the Judge in a case against a municipality than in any other case.

In the present case the learned Judge finds that the existence upon MacNab street, about the centre of the roadway and some 30 feet from the ordinary crossing for foot passengers, of a hole or depression in the asphalt pavement, from  $1\frac{1}{2}$  to  $1\frac{7}{8}$  inches deep at its deepest part, was a breach of the statutory duty of the defendants to keep this highway in a reasonable state of repair.

With the greatest possible respect for the learned Judge, I must express my opinion that this finding carries the liability of corporations many degrees further than it has ever been carried before, and seeks to impose upon them a standard of perfection in regard to their highways far beyond the reason-

\* Reversed (1899), 26 A.R. 43.

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able state of repair which is the measure of their duty under the statute. The learned Judge appears to have fallen into an error with regard to the standard required of them in their care of the roadway, based upon the decisions referred to at p. 911 of the 2nd edition of the American textbook, Elliott on Roads and Streets. These seem all to be founded upon a dictum of Lord Denman's at *nisi prius* in *Boss v. Litton*, 5 C. & P. 407, at p. 408. That was an action for damages brought by a person who, while walking in the carriageway of a street in Islington, had been driven over by the defendant, who was driving a taxed cart. The plaintiff had called a policeman and was calling other witnesses to prove that the footway was so bad that he was obliged to walk in the carriageway, whereupon Lord Denman, C.J., observed: "I do not think that any more evidence need be given on that subject. The policeman has proved the state of the path. A man has a right to walk in the road if he pleases. It is a way for foot-passengers as well as carriages. But he had better not, especially at night, when carriages are passing along." Then in summing up to the jury he told them "That all persons, paralytic as well as others, had a right to walk in the road, and were entitled to the exercise of *reasonable care on the part of persons driving carriages along it.*" This language as applied to similar cases has been frequently approved and adopted, but it does not at all follow from it that there is a duty upon municipalities to keep their carriageways and their ways for foot-passengers up to the same standard. The carriageway is intended for carriages and waggons; the footway for persons on foot; and the degree of repair in which each is to be kept is to be measured by the use for which it is intended. The learned Judge below has not found that the carriageway was out of repair for the purpose for which it was intended; and it is manifest that he could not have done so upon the facts in evidence, for the hole or depression in the asphalt was so trifling that it would hardly cause even a jar to the lightest vehicle. But he seems to have thought that because foot-passengers had a right to cross the carriageway or to walk along it, therefore it must be so kept as to insure them against accidents. This, I think, is a mistaken view of the meaning of Lord Denman's remarks: what he was

pointing out was that persons on foot in the carriageway had a right to protection against persons driving vehicles upon it, and nothing more. If a foot-passenger chooses, as he has a right to do, to walk upon the road, when a footway is provided, he must take the road as he finds it. He has a right to expect to find it reasonably safe for vehicles, but he has no right to expect any higher degree of repair. Therefore, when the learned Judge finds that the roadway was not improperly kept so far as vehicles are concerned, I think he puts the plaintiff out of Court.

In my opinion, however, the finding should go much further in favour of the defendants than this. After a careful perusal of the evidence, it seems to me impossible to say that the condition of this roadway was such as to lead any reasonable man to foresee the remotest chance of danger to any person either on foot or in a carriage from the defect described in the evidence; and if this be so then the municipality was not guilty of negligence in regard to it: *Erwing v. City of Toronto*, 29 O.R. 197; *Burroughs v. City of Milwaukee*, 86 N.W. Rep. 159.

It is suggested that, because the line between a dangerous defect and one not dangerous is a difficult or impossible one to define, therefore, being unable to lay down any hard and fast rule upon the subject, we can do nothing but accept the finding of the trial Judge. It is evident, however, I think, that we cannot by such reasoning refuse the responsibility of dealing with each case upon its own merits. The defects complained of in the various cases brought before us from time to time vary from those which are plainly dangerous to those which plainly are not dangerous. The line is sometimes difficult to draw and always impossible to define, but it is to be found in each case by inquiring whether the defect in question was one from which a reasonable man would have apprehended danger, and we are bound to make that inquiry.

In my opinion, the appeal should be allowed with costs, and the action dismissed with costs.

BRITTON, J.:—I agree fully with the statement of the learned Chief Justice that the finding of fact by a Judge ought

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to be viewed with at least as much respect as that which is accorded to the finding of a jury.

What is actionable negligence, under sec. 606 of the Municipal Act, by reason of default of a corporation to keep a street in repair, must be a question of fact depending upon a variety of circumstances. It seems to me impossible to lay down any general rule as to the kind or size of a hole which may be permitted, and in reference to which the Court should say its existence is no evidence of negligence on the part of the corporation, but Courts have, in many cases, said, and will be called upon to say, that the existence of a certain defect or obstruction in a particular highway does not constitute such want of repair as to render the corporation liable for negligence.

In *Ewing v. City of Toronto*, 29 O.R. 197, the Court held that the existence of hinges a little above the level did not constitute such want of repair as to be actionable.

In *Messenger v. Town of Bridgetown* (1901), 31 S.C.R. 379, it was held that permitting a mound of earth about 8 inches in height to remain at the filling over a trench dug to lay a pipe across a public street, was not a thing so serious or unusual as necessarily to render the corporation liable. It is true the question of contributory negligence was decided against the plaintiff in this case, but that does not touch the point on which the case is cited.

But, to my mind, the point on which this case turns is the finding of the learned county court Judge. He finds, and so states in his judgment, that "the roadway was not sufficiently out of repair to be at all dangerous to horses and vehicles." That is what the roadway was for. It is quite true that the plaintiff had a right to use it, and a right to assume that there were no pitfalls upon it, but no right to assume that it was in any better state of repair than would be reasonable for the ordinary traffic of the street. She had the right to use the street, but at her own risk as to a possible accident arising, it may be from a defect, but such a defect as would occasion no injury or inconvenience to horses or vehicles, and in the great majority of cases would occasion none to a person on foot. Unless municipal corporations are to be insurers against accident, they



ought not to be held liable for such a defect, and upon the facts as found by the learned Judge.

Upon this point I agree with decision of my learned brother Mr. Justice Street.

The appeal should be allowed and the action dismissed.

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[DIVISIONAL COURT.]

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Feb. 26.

*Discovery—Affidavit of Documents—Materiality—Examination of Parties—Scope of—Contents of Document—Costs of Lengthy Examination.*

The plaintiff alleged a contract of partnership between him and the defendant J. for the promotion of a company to purchase certain bicycle plants, and to carry on a bicycle manufacturing business, etc., and that the defendants R. and C. had maliciously caused a breach of the partnership contract; and the plaintiff claimed a partnership account, and damages for such breach and for conspiracy.

It appeared from the examination for discovery of the defendant R. that he obtained written agreements from various companies, either in his own name, or in the names of himself and the defendant C., or in the names of other persons; that these agreements, or some of them, were afterwards assigned to a company which was then incorporated (not a party to this action). The plaintiff alleged that these agreements were, in fraud of his rights, substituted, with variations, for certain agreements previously entered into between the same companies and the defendant J., who was alleged to be the plaintiff's partner in the transactions. The plaintiff also alleged that the defendants R. and C. paid \$20,000 to the defendant J. to induce him to act with them, instead of with the plaintiff, in completing the purchase of the agreements; and it appeared from R.'s examination that he and C. drew a cheque upon their bank account in favour of the defendant J., which was paid:—

*Held*, that the agreements and the cheque and also a certain memorandum prepared by the defendant R. were material to the plaintiff's case, and should be produced or accounted for in the defendants' affidavits on production of documents.

2. That the defendants R. and C. ought not, as a matter of discretion, to be ordered to disclose, upon their examination for discovery, facts which would become material only when the plaintiff should have established his right to recover damages.
3. That the plaintiff was entitled to discovery from the defendants R. and C. as to whether they paid money to J.; whether it was their own money or that of other persons, and if the latter, of what persons; and for what it was paid.
4. That the plaintiff was entitled also to discovery as to the amount paid by R. and C. to the M. company for the bicycle branch of their business; it being alleged by the plaintiff that he and J. had obtained an option to purchase it, and that the defendants had substituted a new option therefor.

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5. That the plaintiff was entitled to know from C. the nature of the agreements made for the purchase of the properties ; if they were in writing, and he had access to them in his capacity of director of the company which was formed, he should inform himself of their contents so as to be able to answer as to them, or should produce copies ; but, if he had no right of access, he was not bound to state his mere recollection of them.

*Seemle*, that where an examination is unnecessarily long, the costs of it should be entirely disallowed.

Decision of MEREDITH, C.J., varied.

THIS was a motion by the plaintiff for an order requiring the defendant Ryckman to file a further and better affidavit on production ; and requiring him and the defendant Cox respectively to attend at their own expense and answer certain questions which they had declined to answer upon their examination for discovery, and to be examined as to all matters consequent on, or arising out of, or necessary to make complete, their answers to these questions.

The motion was argued before Mr. Winchester, the Master in Chambers, on the 20th November, 1901.

*F. A. Anglin*, for the motion.

*C. W. Kerr*, for the defendant Ryckman.

*E. B. Ryckman*, for the defendant Cox.

November 22. THE MASTER IN CHAMBERS:—An action for an account of an alleged partnership between the plaintiff and the defendant Jaffray ; and against the defendants Ryckman and Cox for damages for the malicious procuring of breach of contract by the defendant Jaffray as against the plaintiff, and for conspiracy.

The partnership alleged to have existed between the plaintiff and the defendant Jaffray was for the purpose of promoting a company to purchase existing bicycle plants in Canada, and to carry on the manufacture of bicycles and parts thereof. It is alleged that, the plaintiff and the defendant Jaffray having obtained a number of options from the owners of bicycle plants, the defendants Ryckman and Cox procured Jaffray to break his agreement with Evans, the plaintiff, and obtained from him all necessary information relating to these options or purchases, and agreed with him that they would make the purchases and share in the profits thereof to the exclusion of the plaintiff ; and that this was carried out to the injury of the plaintiff.

In the examination of the defendants Cox and Ryckman a number of questions were asked which they refused to answer. There were also certain documents referred to which were not mentioned in the affidavits on production filed by these defendants. The plaintiff moves for further and better affidavits on production, and also that the defendants do attend and answer the questions objected to.

Upon a careful perusal of the examinations of the defendants, I am of opinion that the cheque referred to by them should be produced, as also the memorandum made by Mr. Ryckman at the interview between him and the plaintiff and defendant Jaffray at the Queen's Hotel. The documents relating to the purchases from the persons who had given options to the plaintiff and defendant Jaffray, or either of them, should also be produced, as they must have some bearing on the issue raised by the pleadings. The further and better affidavit on production will, as agreed on the argument, be made by Mr. Ryckman.

As to the examinations: no doubt, a number of the questions asked were not specific enough, and were, therefore, properly objected to; but, on the other hand, there were many that should have, under the circumstances of the case, been answered, such as those in connection with the payment to the defendant Jaffray of the \$20,000; the persons contributing the same should, I think, have been disclosed; also the persons or corporations approached, so far as they were the same as had given options to Jaffray or the plaintiff; the objects of the syndicate represented by Mr. Ryckman, and his authority and duties in connection with the same, as also the particulars of the options or purchases obtained from those giving options to Evans or Jaffray. The questions, no doubt, can be agreed to from the above headings. However, if necessary I will specify the same more particularly in settling the order herein. I understand that Mr. Ryckman alone will be required to give further answers. Costs to the plaintiff in any event as between him and the defendants Ryckman and Cox.

From this judgment the defendants Ryckman and Cox appealed, and their appeal was heard by MEREDITH, C.J.C.P., in Chambers, on the 29th November, 1901.

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*E. F. B. Johnston*, K.C., and *C. W. Kerr*, for the appellants.  
*F. A. Anglin*, for the respondent.

January 9. MEREDITH, C.J.:—This is an appeal by the defendants Cox and Ryckman from an order of the Master in Chambers, dated the 22nd November last, requiring the defendant Ryckman to file a further and better affidavit on production, and requiring him and the defendant Cox respectively to attend at their own expense and answer certain questions which they had declined to answer upon their examination for discovery, and to be examined as to all matters consequent on, or arising out of, or necessary to make complete, their answers to these questions.

The plaintiff's case, as presented in the pleadings, is that, in and prior to the year 1899, he and the defendant Jaffray agreed to purchase the effects, property, and business of a number of the principal bicycle makers in Canada; that, in pursuance of this agreement, they, on the 28th February, 1899, entered into a co-partnership to purchase bicycle plants in Canada and carry on the business of the manufacture of bicycles or parts of bicycles, and to divide the profits equally; that the defendant Jaffray agreed to procure contracts from manufacturers and treat for the purchase of plants and businesses and aid in the formation of a company for these purposes "together with the plaintiff," and that the profits and losses of the venture should be divided equally; that in pursuance of this agreement purchases were made of a number of bicycle concerns, and an association was formed of a number of manufacturers and capitalists for the purpose of obtaining the incorporation of a company to acquire these properties and carry on that business; that these purchases were made on account of the partnership, though in the name of the defendant Jaffray, and included, amongst others, the purchase of the effects and businesses of six named companies; that the purchase price of them was \$900,000; and that the plaintiff and the defendant Jaffray were prepared to complete the purchases and had made arrangements to re-sell at a profit of \$100,000; and that, besides this profit, other advantages of great value would have accrued to the plaintiff from the carrying out of the purchases and the re-sale; that the



defendants Cox and Ryckman acquired a knowledge of these matters and formed the design of obtaining a profit for themselves by intervening in these purchases and the arrangements between the plaintiff and the defendant Jaffray; that, in pursuance and furtherance of this design, the defendant Jaffray disclosed to the defendants Cox and Ryckman all these matters and arrangements, and agreed with them to exclude the plaintiff and abandon the partnership; that all the defendants joined in an agreement whereby they were to make the purchases and share in the profits to the exclusion of the plaintiff; that, in pursuance of this agreement, the defendants completed the purchases agreed for by the defendant Jaffray for the partnership, altering some of the details of some of them, and allowing others of the agreements to lapse, but that fresh contracts were made substantially the same as those which the defendant Jaffray had made; that these agreements were in reality renewals of the existing agreements, and that the details which were changed were so changed in fraud of the plaintiff and in order to carry out the design which the defendants had formed; that the defendants promoted and organized a company to which they sold the properties which had been purchased, and that a very large profit was made by the defendants out of the transaction; that the defendant Jaffray received \$75,000 as his share of the profits.

And the plaintiff's claim is: as against the defendant Jaffray, for an account of the partnership transactions, and to have the partnership wound up, and "for damages, and for breach of contract;" and as against the defendants Cox and Ryckman, for damages for "the malicious procuring of breach of contract by the defendant Jaffray as against the plaintiff, and for conspiracy."

Assuming that an action for the causes set out in the statement of claim can, on the allegations which it contains, be maintained against the defendants Cox and Ryckman, what, apart from the question of the quantum of the damages, are the issues which must be determined in favour of the plaintiff in order to entitle him to succeed?

I take it that the matters to be proved are the agreement of the plaintiff with the defendant Jaffray; the agreements with

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the various persons and companies with whom agreements for the purchase of their businesses are alleged to have been made; that the defendants Cox and Ryckman conspired with the defendant Jaffray to induce him, in fraud of the plaintiff, to abandon the agreements which had been made, and to join with them in procuring new agreements which were in form new but were really the old ones altered in details in some cases so as to appear to be new agreements made with the defendants instead of with the defendant Jaffray for the benefit of himself and the plaintiff; and damage to the plaintiff by reason of this having prevented the carrying out of the original agreements and the re-sale of the properties which were the subject of them, at a profit.

It appears from the examination of the defendants Cox and Ryckman, that the defendant Jaffray received from the defendant Ryckman \$20,000 after the company which was formed had been floated, and several of the questions in dispute were intended to elicit from these defendants information as to the source from which the \$20,000 came.

These questions appear to me to be irrelevant, and such as these defendants were not bound to answer. I am unable to understand what bearing the inquiry sought to be thus had has upon the matters in question, and the source from which the money came appears to me to be wholly immaterial as far as this action is concerned.

The other questions which the defendant Cox declined to answer relate to the agreements which were ultimately entered into for the purchase of the businesses which were transferred to the company which was formed.

These questions were, I think, relevant, and should have been answered. The answers to them might tend to prove or disprove the allegations of the plaintiff as to the agreements finally entered into having been substantially the same as those which are alleged to have been made with the same parties by the defendant Jaffray on account of the partnership, and therefore might have some bearing on the question of the fraud charged, and the plaintiff was, I think, entitled to have them answered.

There are three questions of a different kind which the defendant Ryckman declined to answer. They are numbered 17, 19, and 67. 17 and 19 practically cover the same point, viz., whether the syndicate, which is called the promotion syndicate, which was formed and brought about the incorporation of the company, had in view the making of a profit by a re-sale to the company of the properties which had been purchased. These questions, and question 67 seem to me almost frivolous, and the inquiry to which they were directed to have no bearing on the issues between the parties, at all events at this stage of the proceedings. The proceeding by examination for discovery is, if properly employed, a most useful one, but it is necessary, to prevent the abuse of it, that it should be kept within reasonable limits, and that it should not be permitted to be made the means for a long drawn out and expensive inquiry as to matters which are irrelevant or not likely to prove of some real service in the litigation, and this is, I think, one of the cases in which as to the questions under consideration the proceeding is being abused.

The appellant Ryckman also objects to the provision of the order by which he is required to file a further and better affidavit on production.

This part of the order cannot be supported, unless it appears from the examination of the defendant Ryckman that he has in his possession documents relating to the matters in question which he has not produced in obedience to the order for production which has been served upon him. The documents which the learned Master thought had been shewn to be in possession of the defendant Ryckman so as to justify the making of an order for their production, for that is substantially the order which has been made, are a cheque for the \$20,000 paid to the defendant Jaffray, a memorandum made by the defendant Ryckman at an interview which took place at the Queen's Hotel, and the agreements which were made on behalf of the promotion syndicate with the companies with which, according to the allegations of the statement of claim, agreements had been made by the defendant Jaffray on behalf of the partnership.

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The cheque referred to is admitted to have been drawn by the defendants Cox and Ryckman on the Canadian Bank of Commerce; but there is nothing in the examination of the defendant Ryckman to shew that it is in his possession, or that it relates to the matters in question in the action.

So as to the memorandum. According to the examination of the defendant Ryckman, it related to the prices at which the different companies were willing to sell, as stated to him at a meeting at the Queen's Hotel at which the plaintiff and the defendant and one Johnston were present; but the defendant Ryckman did not produce it at his examination, and testified that he had made search for it, but was unable to find it.

Upon what principle the order was made as to the cheque and memorandum I am unable to understand. According to the depositions on which the application was based, though search had been made for both of them, neither can be found. What purpose then is to be served by requiring the defendant Ryckman to set these documents out in another affidavit shewing his inability to produce them, when he has already sworn that he cannot do so? None that I can see, and I do not think that that useless formality should have been required to be gone through.

The agreements, though in the custody of the defendant Ryckman, are under his control as solicitor for the company. They are therefore not in his possession in such a way that he can be called upon to produce them under an order to produce; and the order, as far as it relates to them, cannot for this reason be supported: Bray on Discovery, p. 429.

Upon the whole, I am of opinion that the order should be varied by confining it to requiring the defendant Cox to attend again and submit to be examined as to the nature of the agreements which were entered into on behalf of the promotion syndicate with the companies which, according to the plaintiff's allegation, had entered into agreements with the defendant Jaffray, acting on behalf of himself and the plaintiff. If the agreements are in writing, it may be that the plaintiff will take nothing by the order, if the defendant Cox declines to answer on the ground that the agreements are in writing, and I have doubted whether for this reason the order should not be dis-



charged as to this branch of it also, because the further examination will be of no practical use; but upon the whole I have concluded that the better course will be to permit it to stand, and to leave the plaintiff to make what he can out of the further examination, but on the terms that if he takes nothing by it the costs of the further examination must be borne by him.

The defendant Ryckman ought not, I think, to be required to answer as to the contents of the agreements made by the promoters. I have decided that, if in writing, he is not bound to produce them, and if he is privileged from producing them, he cannot be interrogated as to their contents: *Davies v. Waters* (1842), 9 M. & W. 608.

Except as I have indicated, the costs here and below will be in the cause to the successful party.

The plaintiff appealed from this decision, and his appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ., on the 22nd January, 1902.

*F. A. Anglin*, for the plaintiff. The affidavits on production omit all allusion to several relevant documents. On examination for discovery both defendants have refused to answer material and relevant questions. The basis of relevancy or materiality is the pleading of the party seeking discovery, which must, for this purpose, be assumed to be true: *Gresley v. Mousley* (1856), 2 K. & J. 288; *Whyte v. Ahrens* (1884), 26 Ch. D. 717: and fair latitude in construing such pleading must be allowed: *Mack v. Dobie* (1892), 14 P.R. 465. Of the materiality of what is relevant the deponent may not constitute himself the judge: *Smith v. Beaufort* (1842), 1 Hare 507, 519: nor is his allegation of irrelevancy conclusive: *Fraser v. Home Ins. Co.* (1873), 6 P.R. 45. Everything is relevant which may directly or indirectly aid the party seeking discovery: *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55; *Marriott v. Chamberlain* (1886), 17 Q.B.D. 154, at p. 163. It is no objection that the document or answer sought may not be admissible evidence at the trial: *Bustros v. White* (1876), 1 Q.B.D. 423, at p. 425; *Hutchinson v. Glover* (1875), *ib.* 138. So tested, the relevancy and materiality of what the plaintiff seeks is indisputable. The

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defendants' admissions on examination of present or former possession of documents not mentioned in the affidavits entitle the plaintiff to better affidavits: *Wright v. Pitt* (1868), L.R. 3 Ch. 809; *Saull v. Browne* (1874), L.R. 17 Eq. 402; *Morris v. Edwards* (1889), 23 Q.B.D. 287, at p. 293; *Attorney-General v. Emerson* (1882), 10 Q.B.D. 191, 204, 206; *Dryden v. Smith* (1897), 17 P.R. 500, 504; *Cocq v. Hunasgeria Coffee Co.*, W.N. 1868, p. 216; *Westminister, etc., Co. v. Clayton* (1863), 12 W.R. 123. The learned Chief Justice is mistaken in stating that the defendants swear to the loss of the cheque given to Jaffray. But were this the fact, as the defendant Ryckman swears is the case in regard to the Queen's Hotel memorandum, it would not exempt the deponent from liability to make further affidavit: *Ross v. Dublin Tramways Co.* (1881), 8 L.R. Ir. 213; *Sichel & Chance on Discovery*, pp. 137, 149, 150. Not even an offer to produce for inspection upon the motion would suffice: *Wagstaff v. Anderson* (1878), 39 L.T.N.S. 332. That documents are lost, or privileged, or the property of others, may protect them from actual production, but does not dispense with the necessity of including them in the affidavit, wherein the facts excusing production must be fully set forth. For inclusion in the affidavit, past or present physical possession or control is the true basis; for production present legal control may be required: *Swanston v. Lishman* (1881), 45 L.T.N.S. 360; *Clinch v. Financial Corporation* (1866), L.R. 2 Eq. 271; *New British Investment Co. v. Peed* (1878), 3 C.P.D. 196; *Bovill v. Cowan* (1870), L.R. 5 Ch. 495; *Taylor v. Rundell* (1841), 1 Cr. & Ph. 104; *Cameron v. Cameron* (1885), 10 P.R. 522. Though originals may be protected because the property of others, copies in possession of the deponent, if his own property, are not, and must be produced: *Hercy v. Ferrers* (1841), 4 Beav. 97; *Bray on Discovery*, pp. 135, 203, 206. The unanswered questions were proper. They did not involve disclosure of privileged matter. Discovery must be full, especially in a case where fraud is charged, as here: *Flight v. Robinson* (1844), 8 Beav. 22. Even if documents be protected from production, the deponent must, on examination for discovery, disclose all facts within his knowledge as to them and their contents: *Vyse v. Foster* (1872), L.R. 13 Eq. 502; *Clinch*

v. *Financial Corporation, supra*; *Hooper v. Gumm* (1862), 2 J. & H. 602, 605; Peile on Discovery, pp. 114, 134. Though he need not state an uncertain recollection; *Dalrymple v. Leslie* (1881), 8 Q.B.D. 5: he must, if he can, inspect relevant documents, though not in his own physical possession, and must prepare himself to answer as to their contents. That a party is asked to give parol evidence of the contents of documents is no objection on an examination for discovery: *Taylor v. Rundell* (1843), 1 Ph. 222, 226; *S.C.* (1840), 11 Sim. 391; *Stuart v. Bute* (1841), 11 Sim. 442; Bray, p. 135. As to the scope of the examination, the only limit is relevancy to matters to be proved by the examining party at the trial. For this purpose it is proper to seek admissions: *Attorney-General v. Gaskill* (1882), 20 Ch. D. 519. Unless *Bowen v. Hall* (1881), 6 Q.B.D. 333, 338, is overruled on this point by *Allen v. Flood*, [1898] A.C. 1, the plaintiff must at the trial prove that the defendants conspired with the design of making profit, and that he in fact sustained damage, and that the defendants made profit. In this view, questions as to profits, expected and made by the defendants, do not relate merely to consequential relief. The Court certainly has a discretion to order such questions to be answered, and frequently does so order where it would not involve a long or oppressive accounting. This is all the plaintiff asks: *Benbow v. Low* (1880), 16 Ch. D. 93, at p. 98; *Saunders v. Jones* (1877), 7 Ch. D. 435, 449, 452. These are matters on which a jury would act in assessing damages; they would be properly pleaded, and are proper for discovery: *Millington v. Loring* (1880), 6 Q.B.D. 190, 196; *Pape v. Lister* (1871), L.R. 6 Q.B. 242.

*E. F. B. Johnston*, K.C., and *C. W. Kerr*, for the defendants Cox and Ryckman. The plaintiff is not *bonâ fide* seeking discovery to help himself in this action, but rather seeks to inquire into the defendants' affairs to help a rival business. There is no evidence that the defendants ever knew that Evans and Jaffray were partners, or that they or either of them held options on the bicycle properties of companies with whom the defendants dealt. The syndicate, of which the defendants were members, formed the design of buying up bicycle properties long before they knew anything of Jaffray. Jaffray did

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nothing to help them. The defendants swear that they got nothing whatever from Jaffray, and that Evans was unknown to them in the matter. The plaintiff makes allegations in his pleadings charging these defendants with conspiracy, but has sworn on his examination for discovery that he has no grounds for stating that the defendants Ryckman and Cox acted in the manner alleged by him in his pleading. The defendants deny the charges and deny the entire cause of action set up. Unless this sworn denial is untrue, the discovery sought would give the plaintiff information and details as to matters of business of the defendants in which he has no interest or concern. This would be oppressive. The discovery sought involves the disclosure of the business of others, and may seriously prejudice the interests of others: *Verminck v. Edwards* (1881), 29 W.R. 189; *Snow's Annual Practice for 1902*, p. 404. Many of the questions pressed are in reality elsewhere answered, and the plaintiff is bound to accept the answers. The defendants should not be asked to make new affidavits where, as here, they swear that the documents omitted are actually lost or shew facts which make it clear that actual production cannot be ordered, because it would be a mere useless formality. Where the money came from which was paid to Jaffray is irrelevant, and to answer upon this might involve disclosing the names and business of strangers to this action. The agreements made by the defendants with the several bicycle concerns are now the property of the Canada Cycle Motor Company, and are therefore privileged from production, as are copies belonging to the company. If so, the defendants cannot be compelled to disclose their contents: *Enthoven v. Cobb* (1852), 2 DeG. M. & G. 632; *Bray on Discovery*, p. 429. The defendant Ryckman, if he has copies, has them as solicitor of the company, and such copies and his knowledge are therefore privileged: *Davies v. Waters* 9 M. & W. 608. As to profits, Mr. Cox has sworn that none were made. Moreover, this is discovery as to consequential relief, to which the plaintiff is not entitled until he has established his partnership with Jaffray and the alleged conspiracy. Even if what the syndicate paid to the bicycle companies may be material, the prices they received from the Canada Cycle Company cannot possibly be so. The plaintiff cannot get



discovery as to consequential relief: *Graham v. Temperance and General Life Assee. Co.* (1895), 16 P.R. 536. He is limited to the issues for trial: *Benbow v. Low*, 16 Ch. D. 93; *MacGregor v. McDonald* (1886), 11 P.R. 386. He cannot get an account until he establishes his title: *Parker v. Wells* (1881), 18 Ch. D. 477; *Dickerson v. Radcliffe* (1897), 17 P.R. 586; *Star Kidney Pad Co. v. Greenwood* (1883), 3 O.R. 280. The defendants have already answered fully regarding the payment to Jaffray of \$20,000. Further discovery in this direction or for consequential relief would be oppressive: *In re Morgan* (1888), 39 Ch. D. 316; *Snow* (1902), p. 403. As to the defendants examining documents not subject to production, in order to prepare to answer as to their contents, *Taylor v. Rundell*, 11 Sim. 391, is clearly distinguishable. There the defendants were trustees for absent parties interested in the issues. Here the alleged liability of the defendants has no connection with the duties, responsibilities, and rights of the Canada Cycle and Motor Company, who are not parties nor connected with the claims made in this action. The plaintiff's real object is to reach the Canada Cycle and Motor Company, and through these defendants to obtain knowledge of the company's business. The denial by the defendants of the materiality or relevancy of certain matters, which is not contradicted, is conclusive: *Roberts v. Oppenheim* (1884), 26 Ch. D. 724, at p. 734; *Bray*, pp. 181, 188, 488; *Snow* (1902), pp. 382, 411, 412. What the plaintiff seeks is not mere discovery, but liberty to cross-examine on irrelevant matters. The plaintiff fails to note the distinction between discovery and cross-examination. In discovery the party is limited strictly to what is relevant to matters in issue: *Fennessy v. Clark* (1887), 37 Ch. D. 184, at p. 187.

*Anglin*, in reply. The solicitor's privilege does not extend to knowledge derived, as was Mr. Ryckman's, in another capacity. He was a promoter rather than solicitor when he acquired knowledge as to the matters in question: *Bray*, pp. 430, 431. The denial of the plaintiff's cause of action does not affect his right to discovery: *Bray*, pp. 18, 19. That the interests of strangers may be affected by the disclosure sought does not disentitle the plaintiff to discovery: *Gough v. Offley* (1852), 5 DeG. & Sm. 653; *Parnell v. Walter* (1890), 24

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Q.B.D. 441, at pp. 450, 451; Snow (1902), p. 403. If other parties are interested in the transactions complained of, the plaintiff is entitled to know it, if for no other reason, to determine whether he should join them as parties: *McGillivray v. McConkey* (1873), 6 P.R. 56; Bray, p. 19. The plaintiff does not ask any detailed account, but only a general statement as to the profits made by the defendants, which the Court has a discretion to order.

February 26. The judgment of the Court was delivered by STREET, J.:—The nature of the action is set forth in a report of an earlier decision in this action, 1 O.L.R. 614, as well as in the judgments of the Master in Chambers and the Chief Justice of the Common Pleas, and need not be here repeated.

The plaintiff asks that the defendant Ryckman should be ordered to make and file a further affidavit of documents. It appears from the examination of Ryckman that he obtained written agreements from various companies, either in his own name, or in that of his co-defendant Cox along with him, or in the names of other persons; that these agreements, or some of them, were afterwards assigned to the Cycle and Motor Company, not a party to this action. The plaintiff alleges in his statement of claim that these agreements were, in fraud of his rights, substituted, with many colourable variations, for certain agreements previously entered into between the same companies and Jaffray, Jaffray being the plaintiff's partner in the transactions, as the plaintiff alleges.

It further appears from Ryckman's examination that he and the defendant Cox drew a cheque for \$20,000 upon their bank account in favour of their co-defendant Jaffray, which was paid by the bank, and which he says he got back from the bank. Being asked whether he has it now, he says he doesn't know whether he has or not—that he has made no search for it lately, and has not produced it.

The plaintiff alleges in his statement of claim that this cheque for \$20,000 was the consideration, or part of the consideration, given to Jaffray by his co-defendants to induce him to act with them, instead of with the plaintiff, in completing the purchase of the agreements above mentioned.

None of these agreements are produced or referred to in the affidavits on production of Ryckman and Cox, nor is the cheque.

I think these documents are material to the plaintiff's case; both of them have been, if they are not now, in the possession certainly of Ryckman, possibly for himself and Cox, and I think it is clear that they should have been mentioned and accounted for in their affidavits, and, if protection is claimed, that the grounds of the protection should have been set forth. The same remarks apply to the memorandum prepared by the defendant Ryckman at the Queen's Hotel. All were material to the plaintiff's case as set forth in his statement of claim; all were at one time in the possession of one or other or both of the defendants Cox and Ryckman, and the plaintiff is entitled, in their affidavits on production, to have them produced or accounted for.

I think the plaintiff is entitled to a further affidavit on production from Ryckman. The notice of appeal does not ask that Cox should be ordered to make a further one.

The notice of appeal asks that Ryckman may be ordered to give discovery as to certain facts which he refused to disclose.

I do not think that, at this stage of the action, we should, as a matter of discretion, order the defendants to disclose facts which become material only when the plaintiff has established his right to recover damages from them. It may in some cases be proper to give the plaintiff the right at once to go into the question of the *quantum* of damages, or what is called consequential discovery. In the present case I think it is unnecessary for the protection of the plaintiff, and that it would be oppressive, to require the defendants Cox and Ryckman to disclose their dealings with other persons having no interest in this action, and whose interests might be seriously affected by such a disclosure, until the plaintiff has established his right to compel it.

The plaintiff is entitled to discovery from the defendants as to whether they paid money to Jaffray; whether it was their own money that they paid him, or the money of some other person or persons, and if so what persons, and for what it was paid. All these matters may reasonably be treated as coming

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within the scope of what he must prove at the trial in order to make out his case.

The plaintiff is entitled also to discovery as to the amount paid by Cox and Ryckman, or either of them, to the Massey-Harris Company for the bicycle branch of their business; because he alleges that he and Jaffray had obtained an option to purchase it, and that the defendants merely substituted a new option for theirs.

The plaintiff is entitled to know from the defendant Cox the nature of the agreements made for the purchase of the properties in question; if they are in writing, and he has the right of access to them, as he would *prima facie* in his capacity of director of the Cycle and Moter Company, then he should inform himself fully of their contents, so as to be able properly to answer as to them, or should produce copies of them; but, if he have no right of access to them, he is not bound to state his mere recollection of them: *Stuart v. Bute* (1841), 11 Sim. at p. 452; (1842), 12 Sim. 460, at p. 461; *Taylor v. Rundell* (1840), 11 Sim. 391; (1841), 1 Cr. & Ph. 104; *Dalrymple v. Leslie*, Q.B.D. 5.

What I have said above covers all the points which were argued upon the appeal. Several of the questions mentioned in the notice were clearly irrelevant, and others were so loosely framed as to make it impossible to deal with them. The examinations of both defendants were frequently rambling and vague, and were unnecessarily prolonged by repetitions of the same questions in different forms. This is a growing evil, and adds much useless expense to litigation, as well as to the labour both of Judges and counsel. It can only be checked by entirely disallowing the costs of an examination which is unnecessarily long.

The present appeal having been only partially successful, I give no costs of it to either party. I think it will be proper under the circumstances to strike out the 3rd paragraph of the order appealed from and the words "save as aforesaid" in the 4th paragraph; and the order should also be amended in order to carry out the views I have expressed.

E. B. B.



[IN CHAMBERS.]

## RE GARDNER.

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Feb. 25.

*Will—Construction—Distribution of Estate—“Heirs”—“Next in Heirship”—  
Period of Ascertainment.*

Following a gift to the testator's widow of his real and personal estate for her life, there was this clause in a will: “My whole estate (after the death of my wife) be equally divided between my brothers L. G., J. G., Mrs. C. W., and my deceased sister Mrs. S. A. H.'s children, or their heirs. Should no heirs of any of the above be alive, that it go to the next in heirship:”—

*Held*, that the persons entitled in the first place were all the children of the four persons named living at the testator's death or born afterwards during the life of the widow, *per capita*, and not *per stirpes*. The words “children or their heirs” meant “children or their issue,” and gave the share of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, and not by descent from, the child so dying. The shares of the children entitled to share became vested at once; but if any child died in the lifetime of the widow leaving issue, the share of that child was divested and went to such issue, and vested at once, and finally, in the issue, who then became the stock of descent. The words “next in heirship” meant the heirs at law to the realty and the statutory next of kin to the personalty, to be ascertained in each case at the death of the person whose share they took.

MOTION by way of originating notice under Rule 938 for an order declaring the true construction of the will of Robert Gardner, deceased. The facts are stated in the judgment.

The motion was heard by STREET, J., in Chambers, on the 24th February, 1902.

A. McKechnie, for Thomas Holtby, the surviving executor.

R. E. Heggie, for the surviving children of the testator.

J. A. Wright, for the members of the Wright family.

F. W. Harcourt, for the infants.

J. H. Moss, for the class represented by Norman and Harton Walker.

February 25. STREET, J.:—The will is dated the 18th October, 1870, and the testator died on the 25th November, 1870, and the widow died on the 31st December, 1901.

The clause of the will in question follows a gift to the widow of the real and personal estate for her life, and is as follows:—

“I will and bequeath that my whole estate (after the death of my wife which she is only to enjoy the benefits accruing

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therefrom while she lives) be equally divided between my brothers Luke Gardners, Joseph Gardners, Mrs. Catharine Watkins, and my deceased sister Mrs. Sarah A. Hutchinson's children or their heirs. Should no heirs of any of the above be alive that it go to the next in heirship."

Under this clause it was plain that the persons entitled in the first place are all the children of Luke, Joseph, Catharine, and Sarah, living at the testator's death or born afterwards during the lifetime of the widow, and that they are entitled *per capita*, and not *per stirpes*.

The testator intends that, if any one of those entitled should die in the lifetime of his widow, the share should go to the issue of the one dying; this is shewn by the final sentence containing the gift over to "the next in heirship." It is necessary, therefore, to construe the words "children or their heirs" as meaning "children or their issue," and as giving the share of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, and not by descent from, the child so dying.

The result is, that the shares of the children entitled to share become vested at once; but, in the event of any child dying in the lifetime of the widow leaving issue, the share of that child is divested, and goes to such issue, and vests at once, and finally, in the issue, who then become the stock of descent.

The words "should no heirs of the above be alive that it go to the next in heirship" have served their purpose when they have indicated the meaning intended by the testator to be given to the word "heirs" in the sentence given to the word "heirs" in the preceding sentence. That word is to be construed to mean "issue;" so is the word "heirs" in the sentence "should no heirs;" but the words "next in heirship" are to be construed as meaning the heirs at law to the realty and the statutory next of kin to the personalty: *Keay v. Boulton* (1883), 25 Ch. D. 213.

The heirs or next of kin in each case are to be ascertained at the death of the person whose vested share they take.

The shares of the various claimants can be worked out in accordance with this construction.

Costs of all parties out of the estate.

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[FERGUSON, J.]

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Jan. 20.

*Infant—Bond—Void or Voidable—Ratification—Breach—Damages—Interest.*

To secure the plaintiff against loss by reason of his purchase, upon the defendant's representations, of 55 shares of company stock, at \$10 per share, the defendant gave the plaintiff his bond in the penal sum of \$1,100 conditioned to indemnify the plaintiff against any loss or damage he might sustain in reference to the stock, and conditioned also that at any time after the date of the bond the defendant should, at the request of the plaintiff, purchase from the plaintiff or find him a cash purchaser for 11 of the 55 shares at \$50 per share, less expenses of sale, not to exceed 10 per centum. The defendant was an infant when he executed the bond:—

*Held*, that the bond was, not void *ab initio*; that it was only voidable; and, upon the evidence, that it was adopted and ratified by the defendant after he had attained full age.

2. That the shares held by the plaintiff not being of any value, the plaintiff's damage by reason of the breach of the bond was \$495, the price of the 11 shares, less 10 per centum.
3. That the recovery was not for a debt or liquidated demand, and the plaintiff was not entitled to interest, the amount not having been ascertained until judgment.

THIS was an action upon a bond given by the defendant to secure the plaintiff against loss upon a purchase of shares of company stock. The defence was that the defendant was an infant when he executed the bond. The facts are stated in the argument and judgment.

The action was tried at St. Catharines on the 9th December, 1901, by FERGUSON, J., without a jury.

G. Lynch-Staunton, K.C., and A. W. Marquis, for the plaintiff. There are two questions only to be considered in this action, namely, whether the defence of infancy is available, and whether the plaintiff is entitled to interest if entitled to succeed. The defendant's contention that infants' bonds with a penalty are void is not tenable. The old cases establish that all deeds of infants are merely voidable, and not void, and may be confirmed either directly or by acquiescence after the infant comes of age. When the cases are examined it will be found that the words "void" and "voidable" are used in the old cases indiscriminately. For example, in citing *Ayliff v. Archdale* (1602), Cro. Eliz. 920, it is said that it decides that a bond with a

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penalty is void. When examined it is found that the question was whether the bond was good or voidable. In *Zouch v. Parsons* (1765), 3 Burr. 1794, Lord Mansfield said (p. 1806): "There are many obiter sayings; but there is no sufficient authority, clearly to outweigh the reasons against this position. I cannot find a case adjudged singly upon this ground." *Foley v. Canada Permanent L. and S. Co.* (1882-3), 4 O.R. 38, reviews the cases and takes this position. The authorities are reviewed and the above conclusion arrived at in *Pollock on Contracts*, 5th ed., p. 53. The plaintiff is entitled to interest. A jury have express power to give interest by way of damages: and see *McCullough v. Clemow* (1895), 26 O.R. 467.

*C. A. Masten* and *F. C. McBurney*, for the defendant. Assuming infancy to be proved as a fact, the sole question is, whether the bond, though incapable of enforcement when given, has become enforceable by anything which has occurred since the infant came of age. The evidence does not establish ratification. If there was any ratification, it was by parol. Mere lapse of time cannot ratify where the infant after coming of age is not accepting further benefits. The bond, being under seal and for a penalty, cannot be ratified except by an instrument of the like solemnity. The question is not the broad one, whether this contract is void or voidable, but the narrower one, whether it is possible to ratify an infant's bond containing a penalty, unless by instrument under seal. We submit that ratification by parol after majority is ineffective. We admit that a contract which is for the benefit or advantage of an infant may be ratified by him after majority. We are not concerned with the broad question whether every bond given by an infant with a penalty is utterly void *ab initio*. Many authorities support that view, but we do not need to go so far. The contention here is, that, unless there is something amounting to an estoppel in law of as high authority as the bond itself, the bond, being that of an infant, is avoided: *Baylis v. Dineley* (1815), 3 M. & S. 476; *Am. & Eng. Ency. of Law*, 2nd ed., vol. 4, p. 625 *et seq.*, and cases there cited; *Simpson on Infants*, 2nd ed., p. 93; *Coke on Littleton*, 172 (a); *Ayliff v. Archdale*, Cro. Eliz. 920; *Fisher v. Mowbray* (1807), 8 East 330; *Stikeman v. Dawson* (1847), 16 L.J. Ch. 205, 1 DeG. & Sm. 90; *Pollock on*



Contracts, 5th ed., p. 53; *Meakin v. Morris* (1884), 12 Q.B.D. 352, at p. 354. In any case the contract was an improvident one, incapable of being enforced against one who was an infant at the time. If the stock proved good, the purchaser got it at a very cheap price; if the stock proved bad, the infant guaranteed the purchaser against all loss. The plaintiff's speculation was a safe one; if he lost, his loss was to be thrown on the infant. So improvident a bargain can, under no circumstances, be ratified.

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January 20. FERGUSON, J.:—The defendant was engaged in selling stock of the Colorado River Irrigation Company. The plaintiff, relying upon the defendant's representations respecting the stock, became the purchaser of 55 shares of the stock at \$10 per share, and paid the defendant therefor the sum of \$550 in cash. In order to secure the plaintiff against loss by reason of his purchase, the defendant gave the plaintiff his bond in the penal sum of \$1,100 conditioned to indemnify the plaintiff against any loss or damage he might sustain in reference to the stock (specifying some of the various ways in which damage or injury to the plaintiff might possibly arise), and conditioned also that at any time after the date of the bond, which was the 1st day of February, 1893, the defendant should, at the request of the plaintiff, purchase from the plaintiff or find him a cash purchaser for 11 shares of the said stock at and for the price of not less than \$50 per share, less expenses of sale, not to exceed ten per centum.

The plaintiff duly requested and demanded performance of the condition to purchase or find a cash purchaser for the 11 shares, and there was, doubtless, a breach by the defendant of this condition, the damages to the plaintiff being, as was not disputed at the trial, this sum of \$550, the plaintiff also claiming interest thereon.

But for the defendant's plea of infancy at the time of his executing the bond, I cannot perceive any good reason why the plaintiff should not recover for breach of the condition of the bond.

The plaintiff also sues upon a promissory note made by the defendant and indorsed to the plaintiff, for the sum of \$300.

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At the close of the evidence, I, however, gave judgment against the plaintiff in respect of this note, upon the defendant's plea setting up the Statute of Limitations.

As to the action upon the bond the defendant pleaded "infancy" at the time of his executing it. This plea the defendant proved by the evidence of his father and his mother, taken upon a commission in the city of New York. Whatever the real fact may be, I must find upon the evidence that this plea is proved, and that, for the purposes of this action, the defendant was under twenty-one years old when he executed the bond. If the bond is considered as voidable only, it was, and had to be, conceded at the trial that the defendant had, after attaining full age, done acts and made statements sufficient to adopt and ratify it as a contract binding upon him; and, besides, a period of seven years or more had elapsed after the defendant had attained full age without his having said or done anything by way of repudiation of the contract, which alone, according to many authorities, was a ratification of the contract.

The argument of the case was thus reduced to the single question, which was as to whether the bond, when made, was "voidable only" or "absolutely void," the plaintiff contending that it was voidable only, and that it had been affirmed and ratified by the defendant after full age, and that the defendant was liable upon it; and the defendant contending that the bond, when made, was absolutely void and incapable of adoption or ratification, and that the defendant is not liable upon it.

Since the argument I have availed myself of such opportunity as I have had and examined a very large number of authorities, including those that were cited by counsel. These are too long and too numerous to be digested here, and I do not perceive any good to arise from my so doing.

I am now of the opinion that the statement on the subject found in Pollock on Contracts, 5th ed., p. 59, is well authorized and expresses the law. At least, after the perusal of authorities above alluded to, I am unable to say that I find anything incorrect in the statement.

The author, having referred to many cases and propositions, said: "On the whole, then, we have seen that in several

important classes of cases (including some that were formerly supposed exceptional) an infant's contract is certainly not void: and we have also seen that there is not any clear authority for holding that in any case it is in fact void. The opinion here maintained appears to be now generally accepted." This view is approved of by Anson: see 8th ed., p. 108.

I thus arrive at the conclusion that the bond sued on in the present case was not void *ab initio*; that it was only voidable; and that, in the manner before stated, it was adopted and ratified by the defendant after he had attained full age.

It was not stated or contended at the trial that the stock held by the plaintiff which should, under the terms of the condition in the bond, have been purchased by the defendant or a cash purchaser found by him, is of any value; so that the damages arising to the plaintiff by reason of the breach by the defendant was the \$550, the price of the eleven shares of \$50 each, less the ten per cent. mentioned in the bond as the costs of the sale. This, I think, clearly sounds in damages. It does not seem to be a debt or liquidated demand, for it might have happened that the liability would have been much less, or even only nominal, owing to an increase in the value of the stock.

On the question of the interest claimed by the plaintiff I was referred to the case *McCullough v. Clemow* (1895), 26 O.R. 467, at pp. 472 *et seq.* I am of the opinion that interest cannot be allowed to the plaintiff, for the reason that what he recovers is damages, the amount of which has not been ascertained till now. The rule, I think, is, that interest on damages cannot be recovered, at least until the amount thereof has been ascertained.

The plaintiff is entitled to judgment against the defendant for the sum of \$495, with his costs of the action.

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## [DIVISIONAL COURT.]

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Feb. 14.

## PARENT V. COOK ET AL.

*Practice—Third Parties—Notice—Time—Enlarging—Rules 209, 353.*

THIS was an appeal from a judgment of Meredith, C.J.C.P., reported, 2 O.L.R. 709.

The appeal was heard before a Divisional Court composed of STREET and BRITTON, JJ., on February 14th, 1902.

*J. H. Rodd*, for the appeal, cited *Confederation Life Association v. Labatt* (1898), 18 P.R. 238; *Carshore v. North Eastern R.W. Co.* (1885), 29 Ch. D. 344; *Payne v. Coughell* (1895), 17 P.R. 39; *Page v. Midland R.W. Co.*, [1894] 1 Ch. 11.

*J. H. Moss*, contra, was not called upon. At the close of the argument,

STREET, J., held that although the third party notice had not been served within the time limited by the Rule (209), that defect might have been remedied in a proper case. There was no warranty either express or implied in the agreement in question. It might possibly be modified in another action, but there was no common question to be tried; and the damages here were not merely the same damages that might be proved in another action.

BRITTON, J., concurred in the considered judgment appealed from, while expressing no opinion as to the agreement.

Appeal dismissed with costs.

G. A. B.



[STREET, J.]

## RE BRADBURN AND TURNER.

1902

Feb. 22.

*Vendor and Purchaser—Vendors and Purchasers Act—Will—Debts Charged on Lands—Executor's Power to Sell, R.S.O. 1897, ch. 129, secs. 18 and 19—Dower—Evidence of Election.*

A testator by his will directed his executors to pay his debts and subject to the payment of them devised a particular portion of his estate and directed that the balance of such portion after payment of the debts should be divided amongst his four children in equal shares. Then followed a paragraph that the property devised should go to the devisees direct:—

*Held*, that a power of sale was given to the executors under the provisions of sec. 18 of ch. 129 R.S.O. 1897, and that purchasers were by sec. 19 released from the necessity of enquiring as to the due execution of the power.

The will also contained gifts to the widow including an annuity to be accepted in lieu of dower, which was regularly paid to her, and which she apparently had elected to accept in lieu of dower:— 851

*Held*, that the purchaser was entitled either to a release from her or to a declaration from her in form sufficient to estop her as against him from claiming dower.

THIS was a case stated under the Vendors and Purchasers Act, R.S.O. 1897, ch. 134, and the questions raised by it were:

(1) Whether the evidence that the widow had elected to take under the will of her husband in lieu of her dower was sufficient; and (2) Whether the executors, the vendors, could make title without joining with them, the beneficiaries, under the will, or any other person.

The petition was argued in Weekly Court on the 20th February, before STREET, J.

The material provisions of the will are set out in the judgment.

A. P. Poussette, K.C., for the vendors, contended that the land was charged with the payment of debts, and that the executors had power to sell under the Trustee Act, R.S.O. 1897, ch. 129, secs. 16, 18, and 21, and that the statutory declarations which had been furnished were sufficient evidence of the widow's election of the benefits under the will in lieu of dower.

E. A. Peck, for the purchaser, contended that where the land was, as here, devised absolutely, even when subject to debts, the estate vested in the legatees, citing *Collier v. Finch* (1856), 5 H.L.C. 905, decided before the Trustee Act; and that

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this case did not come under section 16, as there was no devise to trustees; and that section 20 limits section 18, and leaves the law where it was, citing *Re Wilson, Pennington v. Payne* (1886), 54 L.T.N.S. 600; *Corser v. Cartwright* (1873), L.R. 8 Ch. 971. *Poussette*, in reply.

February 22. STREET, J.:—The testator Thomas Bradburn by his will, dated 12th January, 1900, in the first place appointed his three sons, who are the vendors, to be his executors, directing them to pay all his lawful debts out of his estate. Then follow devises and bequests of real and personal property to various members of his family. These are followed by a clause declaring that all the foregoing property is to be free and clear of every incumbrance whatsoever. The next clause is as follows:—"I do hereby will the following property subject to the payment of all my lawful and just debts; . . . and when all my debts are fully paid, the balance shall be divided amongst my said four children, Thomas, William, Rupert, and Mabel, share and share alike. . . . The property which I will to my children, share and share alike, are situated as follows:" then comes a list of the lands referred to in this clause, covering the land which is the subject of the petition.

Then the will proceeds: "I would here suggest what I consider the best means of protection for all parties interested in this, my will, to make no division of any of my property, but pool it altogether and divide the proceeds share and share alike. . . . The property willed and described herein is intended to go to the parties direct."

There is, therefore, found in the will, a direction to the executors to pay the debts, a charge of the debts upon a particular portion of the estate, and a direction that the balance of this portion of the estate, after payment of the debts, shall be divided amongst his four children in equal shares.

The case comes, therefore, within the provisions of sec. 18 of ch. 129 R.S.O. 1897, under which, when a charge for debts is created, but the estate is not vested in any trustee or trustees by the terms of the will, a power of sale is given to the executors; and purchasers are by the 19th section relieved from

the necessity of inquiring as to the due execution of the power.

Therefore, I think that the executors here can make title to these lands without the concurrence of any of the devisees.

The children's rights are given to them only in the residue after payment of the debts, and the later references in the will must be read accordingly.

The will contains various gifts to the widow, including an annuity of \$1,500, payable quarterly, and declares that she is to accept them in lieu of dower.

The petition states that after the death of the testator she elected to, and did accept the provision made for her in lieu of dower, and has been regularly paid the annuity.

The purchaser is entitled either to a release from her or to a declaration from her in a form sufficient to estop her as against him from claiming dower; for her receipt of the annuity is only *prima facie* evidence against her, and she might in spite of it be let in to claim her dower, in case it should appear that she had elected without proper knowledge of the effect of her so doing.

There will be no costs to either party against the other.

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[IN CHAMBERS.]

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MORANG V. ROSE.

Feb. 3.

*Parties—Application to Strike Out—Matter of Substance.*

An objection that a person joined with others as plaintiff in an action has no title to maintain the action, is matter of substance which should be raised on the pleadings as provided by Rule 259, and is not a proper subject for an application to strike out parties under Rule 185.

THIS was a motion by defendants under Con. Rule 206 to strike out the name of one of the plaintiffs, under the circumstances mentioned in the judgment.

The motion was heard before Mr. Winchester, the Master in Chambers, on February 1st, 1902.

*G. G. S. Lindsey*, K.C., for the defendants.

*J. H. Moss*, for the plaintiffs.

No authorities were cited on the point of practice involved.

February 3. THE MASTER IN CHAMBERS:—An application by the defendants for an order that the name of Gertrude Lewes as a plaintiff be struck out on the ground that she is improperly joined as a plaintiff, etc. The action is brought to restrain the defendants from infringing the plaintiff's copyright, and in the 5th paragraph of the statement of claim it is alleged: "By an agreement in writing bearing date the 6th day of March, 1901, the plaintiff Gertrude Lewes assigned to the plaintiff George N. Morang & Company, Limited, all proprietorship in and right and title to copyright of the said 'The Mill on the Floss' so far as the Dominion of Canada is concerned, and the said assignment was duly entered by or on behalf of the said George N. Morang & Company, Limited, on the registry book of the Stationers' Company, kept at the Hall of the Stationers' Company in London, England, pursuant to the Imperial Statute 5 & 6 Vict. ch. 45."

In support of the application it is contended that the plaintiff Morang being the proprietor of the copyright for the Dominion of Canada, is the only one entitled to bring such an action as the present.



The plaintiffs contend that it may be held that the assignment of the copyright to the plaintiff Morang is not sufficient to entitle him to the relief asked for, and in order to prevent a miscarriage of justice the plaintiff Gertrude Lewes has been added, as she is entitled to the relief should the plaintiff Morang fail.

Rule 185 provides "that all persons may be joined in an action as plaintiffs in whom any right to relief, in respect of or arising out of the same transaction or occurrence, or series of transactions or occurrences, is alleged to exist, whether jointly, severally, or in the alternative. . . ."

During the argument I suggested that the defendants should raise the objection in the statement of defence as a question of law, under Rule 259, but defendant's counsel claimed that under Rule 206 he was entitled to have the matter disposed of on motion to strike out the improper party. In my opinion the defendant must raise this question by his pleading, as provided by Rule 259. See *McClenaghan v. Grey* (1883), 4 O.R. 329, at p. 334, where Mr. Justice Proudfoot held that the demurrer, on the ground that the plaintiff had no title to maintain the action, etc., was not a demurrer for want of parties, but was a matter of substance,—that the plaintiffs have no right of action.

This application will be refused; the defendants to raise the objection by their defence to be delivered in seven days.

Costs in the cause.

A. H. F. L.

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## [IN THE COURT OF APPEAL.]

1901

REX V. MORGAN.

Dec. 19.

*Criminal Law—Summary Trial—Police Magistrate—Theft—Attempt to Commit—Conviction—Warrant of Commitment—Necessity for.*

A prisoner, charged with picking a woman's pocket and stealing a sum of money from her person, on being brought before a police magistrate elected to be tried summarily, but was convicted merely of an attempt to pick the pocket:—

*Held*, that the defendant was properly convicted, for that the charge was one which might have been tried at the sessions; and therefore, under sec. 785 of the Criminal Code, could with the accused's consent be tried by the police magistrate, who could sentence him to the same punishment as if tried at the sessions; while by sec. 711, where the offence charged is not proved, a conviction can be made for the attempt to commit the offence.

*Per Moss, J.A.*:—The conviction being sustainable under sec. 785, it was unnecessary to decide whether a person charged with theft in a case under sub-sec. (a) of sec. 783, might, upon his consenting to be tried on that charge, be properly convicted of having attempted to commit theft under sub-sec. (b), without the charge therefor being made, or his consent to be tried therefor given.

*Quære*, as to the necessity for a formal commitment.

Decision of Street, J., 2 O.L.R. 483, affirmed.

THIS was an appeal from the judgment of Street, J., reported 2 O.L.R. 413.

The prisoner on the 19th June, 1901, was charged before the police magistrate of the town of Barrie that he did on the 15th June, 1901, pick the pocket of a woman named Salter, "and did steal from her person a sum of money."

On the prisoner being brought before the magistrate he elected to be tried summarily, and was remanded for trial until the 24th June, 1901.

On the 24th June he was tried before the magistrate and convicted of having "attempted to pick the pocket," and was sentenced to be imprisoned in the Central Prison at Toronto, and there kept at hard labour for the term of six months.

The conviction recited the charge and that the prisoner elected to be tried summarily.

On the defendant being taken to the Central Prison, in pursuance of the terms of the conviction, a conviction signed and sealed by the magistrate, as above stated, was lodged with the jailor of the Central Prison, as the warrant for his detention there.

Writs of *habeas corpus* and *certiorari* were issued, under which the depositions taken before the magistrate upon the trial, as well as the information, were brought up on the *certiorari*, and the jailor of the Central Prison brought up the prisoner with the warrant for his detention.

The prisoner's discharge was moved for on the grounds: (1) that having elected to be tried summarily on the charge of stealing from the person he could not be convicted of merely attempting to do so; (2) that there had been no proper warrant issued; and (3) that no offence was described in the conviction.

The learned Judge refused to grant the discharge.

From this judgment the prisoner appealed to the Court of Appeal.

The appeal was argued before ARMOUR, C.J.O., MACLENNAN, MOSS, and LISTER, J.J.A., on December 5th, 1901.

*J. E. Jones*, for the prisoner. The defendant was charged with theft under sec. 783 of the Criminal Code, 55 & 56 Vict. ch. 29 (D.), and he elected to be tried summarily on such charge, and was prepared to meet it. If the prisoner was not to be tried for such an offence, but for the attempt to commit the offence, then, under sec. 773, a charge therefor should have been drawn up and preferred against him: *Rex v. Dungey* (1891), 1 O.L.R. 224. Section 711 does not authorize the conviction, for that section only applies to jury trials. A warrant of commitment should have been issued. The judge before whom a prisoner is brought upon a writ of *habeas corpus* has no power to order the detention of the prisoner; and therefore Mr. Justice Street acted without jurisdiction in making such order. No offence is described in the conviction. The charge of "picking the pocket" is not an offence. The charge should have been, the attempt to commit theft, or stealing from the pocket: *Watts v. Rymes* (1673), 2 Lev. 51; *Re Beebe* (1863), 3 P.R. 270.

*J. R. Cartwright*, K.C., Deputy Attorney-General, for the Crown. There is no necessity to rely on sec. 783. The conviction can be sustained under sec. 785. The offence was clearly one which could have been tried at the court of general sessions, and, therefore, with the prisoner's consent was triable

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before the magistrate. Section 711 which applies to all trials, and not merely to jury trials, and which must be read in connection with sec. 783, provides for a conviction for an attempt to commit the offence. No warrant of commitment was necessary: sec. 798. The objection, however, is met by the order of the learned Judge directing the prisoner's detention. The charge stated in the conviction is perfectly good. "Picking the pocket" is a well known term, and means "theft" or "stealing" from the pocket: Harris's Criminal Law, 8th ed., 217; Bishop's Criminal Law, 7th ed., vol. i., sec. 743. See also sec. 611. The defendant was in no way misled by the form of the charge.

December 19. ARMOUR, C.J.O.:—The prisoner was charged before a police magistrate with having picked the pocket of a woman, and with having stolen from her person a sum of money.

This was an offence for which the prisoner might have been tried at a court of general sessions of the peace, and he might with his own consent have been tried before the said police magistrate, and might have been sentenced to the same punishment as he would have been liable to had he been tried before the court of general sessions of the peace: Criminal Code, sec. 785; *Regina v. Conlin* (1897), 29 O.R. 28.

The prisoner having been brought before the said police magistrate, charged as aforesaid, and having consented to be tried summarily, was so tried by the said police magistrate, and was convicted of an attempt to pick the pocket of the said woman, and was by the said police magistrate adjudged to be imprisoned in the Central Prison at Toronto, and there kept at hard labour for the term of six months.

Section 711 of the Criminal Code provides that "when the complete commission of the offence charged is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly;" and this provision plainly applies to the summary trial of indictable offences.

And when the prisoner consented to be tried summarily upon the said charge, he must be taken to have assented to be



tried summarily for whatever offence he might properly be found guilty of upon the said charge, and having been properly found guilty upon the said charge of an attempt to commit the offence charged, he must be held to have been legally convicted upon the said trial.

An indictment in the terms of the conviction for attempting to pick the pocket of a person would seem to be sufficient under the provisions of sec. 611 of the Criminal Code, and if so the conviction should be held to be sufficient.

The case of *Watts v. Rymes* (1673), 2 Lev. 51, relied on in support of the objection to the conviction, cannot now be considered law: *Odger's Law of Libel*, 3rd ed., 68, 131.

If a formal commitment were necessary the learned Judge did right, there being a valid conviction in allowing a formal commitment to be lodged.

As to whether there was any necessity for a formal commitment, see *Barnes' case* (1676), 2 Rolle's Reports 157; *Brass Crosby's case* (1771), 3 Wils. 188; *Rex v. Clerk* (1697), 1 Salk, 349; *Rex v. Suddis* (1801), 1 East 306; *Leonard Watson's case* (1839), 9 A. & E. 731.

In my opinion the appeal must be dismissed.

Moss, J.A.:—It is not necessary for the determination of this appeal to decide whether a person charged with theft in a case falling under sub-sec. (a) of sec. 783 of the Criminal Code may upon his consenting to be tried upon that charge be properly convicted of having attempted to commit theft under sub-sec. (b) without the charge being made or his consent to be tried therefor obtained. And I do not wish to be understood as agreeing that a magistrate has power so to deal with the case.

This case does not appear to have been dealt with at all under sec. 783 (a), for under it before the magistrate could put the question to the accused whether he consented to be tried summarily he had to satisfy himself first that property was alleged to have been stolen; and, secondly, that, in his judgment, the value did not exceed \$10. And this he could not do, for nothing was shewn as to the value of the property alleged to

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have been stolen, except the statement in the information that the value was unknown.

The accused appears to have given his consent before any testimony was taken, and the proceedings seem to have been under sec. 785 of the Code as it is now to be read by virtue of 63 & 64 Vict., ch. 46 (D.). And I think that the conviction in this case may be sustained on the ground that the prisoner was charged before a police magistrate with an indictable offence for which he might be tried at a court of general sessions of the peace: Criminal Code, sec. 344; and that the language of sec. 785 of the Code, as it now reads by virtue of 63 & 64 Vict., ch. 46, is wide enough to enable a police magistrate proceeding thereunder to find the accused, who is being summarily tried with his own consent, guilty of whatever offence he might have been convicted of and amenable to whatever punishment he would have been liable to if he had been tried at the general sessions.

The appeal therefore fails.

MACLENNAN and LISTER, JJ.A., concurred.

G. F. H.

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## [DIVISIONAL COURT.]

REX V. MEEHAN ET AL.

1902

Feb. 27.

*Divisional Court—Jurisdiction—Justice of the Peace—Orders Absolute Under sec. 6, ch. 88, R.S.O. 1897—Judge in Court—Divisional Court.*

Orders absolute requiring a justice of the peace to do any act relating to the duties of his office under sec. 6 of ch. 88, R.S.O. 1897, are not final, but are appealable, and as a result should be heard before a single Judge sitting as the High Court and not before a Divisional Court.

THIS was a motion to make absolute an order *nisi* under sec. 6 of ch. 88 R.S.O. 1897, requiring the defendant Patrick Meehan and the police magistrate of the city of St. Thomas to shew cause why a writ or order of mandamus should not be issued commanding the said police magistrate to receive and take the oath of one Alexander D. Turner to a certain information preferred by him against the said Meehan, and proceed thereon according to law.

The order *nisi* was granted on February 7th, 1902, by a Divisional Court composed of Ferguson and Meredith, JJ., and was argued on February 14th, 1902, before a Divisional Court composed of STREET and BRITTON, JJ.

*I. F. Hellmuth*, moved absolute the order.

*E. E. A. DuVernet*, raised the preliminary objection that the proper proceeding was by a motion before a Judge in Court under sec. 6, ch. 88 R.S.O. 1897, and not before a Divisional Court. The application may be made to the High Court or a Judge of the county court. The Divisional Court is invested with certain functions under secs. 66 and 67 of the Act, and if the application was first made to a single Judge, and an appeal taken from him, it would be to the Divisional Court: *Regina v. Beemer* (1888), 15 O.R. at p. 272; *Regina v. Wasson* (1890), 17 A.R. at p. 245, *per Osler, J.A.*; *Re Potter and Central Counties R.W. Co.* (1894), 16 P.R. 16, followed in *Re Montreal and Ottawa R.W. Co. and Ogilvie* (1898), 18 P.R. 120; *Re E. J. Parke* (1899), 30 O.R. 498; *Holmsted & Langton*, 2nd ed., 117, 239.

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*I. F. Hellmuth.* A Divisional Court may hear this motion in the first instance. A disobedience of a statute is an indictable offence at common law. The magistrate should have dealt with it: sec. 554 of the Code. This proceeding should be as for a criminal offence: R.S.O. 1897, ch. 90, sec. 2, sub-sec. 3. The Divisional Courts have been constituted criminal courts, and criminal matters and matters of contempt should come before them: Code sec. 3, sub-sec. (y); *Queen v. Birchall* (1890), 19 O.R. 697. Even if a motion might be made under R.S.O. 1897, ch. 88, before a Judge in Weekly Court, that would not oust the jurisdiction of Divisional Court to entertain the same if the Court saw fit; for a Divisional Court is the High Court as much as a Judge sitting in Weekly Court.

*John R. Cartwright*, K.C., Deputy Attorney-General, for the Crown, also supported the motion.

February 27. The judgment of the Court was delivered by STREET, J.:—It is provided by sec. 6 of ch. 88 R.S.O. 1897, that "In all cases where a justice of the peace refuses to do any act relating to the duties of his office as such justice, the party requiring the act to be done may, upon an affidavit of the facts, apply to the High Court or to the Judge of the county court of the county or united counties in which the justice resides, for an order *nisi* calling upon the justice, and also the party affected by the act, to shew cause why the act should not be done; and if, after due service of the order, good cause is not shewn against it, the Court or Judge may make the same absolute, with or without or upon payment of costs, as may seem meet, and the justice, upon being served with the order absolute, shall obey the same, and shall do the act required; and no action or proceeding shall be commenced or prosecuted against the justice for having obeyed the order and done the act required as aforesaid."

The order *nisi* and the order absolute provided for by this section are civil and not criminal proceedings, although the act which the justice is ordered to do may be, as here, the taking of an information for a criminal offence, and although the proceedings are taken in the name of the King.



It is, therefore, to the Judicature Act and the Rules of Court, taken along with the section above quoted, that we must look in order to ascertain the tribunal in which the proceedings are to be taken—that is to say, in order to ascertain what is meant by “the High Court” in the section. Does it mean the Divisional Court, or does it mean a single Judge of the High Court sitting in Court?

By the 65th section of the Judicature Act, it is provided that “(1) Every action and proceeding in the High Court, and all business arising out of the same, except as hereinafter provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single Judge.

(2) A Judge sitting elsewhere than in a Divisional Court, is to decide all questions coming properly before him, and is not to reserve any case, or any point in a case, for the consideration of a Divisional Court.

(3) In all such cases any Judge sitting in Court shall be deemed to constitute a Court.”

If this application is one of the matters assigned by the Judicature Act, sec. 67, or by any Rule of Court to be heard by a Divisional Court, it is properly before us; otherwise it should be heard by a single Judge in Court under sec. 65 of the Judicature Act.

The only head of Divisional Court work under which it could come is sub-sec. (a) of sec. 67, which assigns to the Divisional Courts “Proceedings directed by any statute to be taken before the Court, *in which the decision of the Court is final.*”

The word “final” is here used in the sense of “not appealable;” and, therefore, if it is to be gathered from sec. 6 of ch. 88 R.S.O., that there is to be no appeal from the order absolute to be made under it, then the present matter is properly before us, otherwise it must be brought before a single Judge sitting in Court.

No appeal is expressly given by the section itself, but the order is in fact in the nature of the former writ of prerogative mandamus, and of the present order of mandamus, granted upon motion under the Judicature Act and Rules of Court, which is clearly a matter in which an appeal lies. There is, therefore,

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no apparent reason why such an order, when made under the section in question, should not take its place alongside orders of a similar character, and fall under sub-sec. (1) of sec. 75 of the Judicature Act, which gives an appeal to the Divisional Court "from any judgment or order of a Judge of the High Court in Court, whether at the trial or otherwise."

The fact that the order may be made under sec. 6 of ch. 88 R.S.O., by a Judge of the county court seems to present no argument against this conclusion, because an appeal against his decision appears to be given by sec. 52 of ch. 55, the County Courts Act.

I conclude, therefore, that orders absolute made under sec. 6 of ch. 88 R.S.O., are not final, but are appealable; that, as a result they are to be heard before a single Judge, sitting as the High Court, and not before a Divisional Court, and therefore that the present motion cannot be entertained by us.

The application for the order *nisi* was made *ex parte* to the Divisional Court, which made it, and their attention was not directed to the question of jurisdiction.

The matter has, however, been fully argued before us at great length, and by consent of the parties a further argument may be rendered unnecessary. If such a consent is forthcoming within one week, judgment upon the merits will be delivered by a single member of the Court, otherwise the rule *nisi* will be discharged without costs, and without prejudice to a further application to a single Judge in Court.

G. A. B.

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[IN CHAMBERS.]

## DOMINION BURGLARY GUARANTEE CO. v. WOOD.

1902

March 5.

*Practice—Discontinuance of Action—Counterclaim—Cause of Action—Jurisdiction.*

Where the plaintiff discontinues his action after the defendant has delivered a counterclaim, the defendant may proceed with his counterclaim as if it were an action; the plaintiff will then be in the same position as a defendant served with a writ of summons; and if the counterclaim is one which the defendant could assert only by virtue of the plaintiff having come into the jurisdiction and sued the defendant, he should not be allowed to proceed with it as a term of permitting the plaintiff to discontinue.

AN application by the plaintiffs for an order giving them leave to discontinue the action on the usual terms as to costs, after the delivery by the defendant of a statement of defence and counterclaim, but before the plaintiffs had replied to the counterclaim, though after they had obtained an order for the defendant to produce documents. The plaintiffs were an incorporated company, having their head office in the Province of Quebec; the action was upon a judgment recovered in that Province; and the counterclaim was for a tort alleged to have been committed in that Province.

Rule 430.—(1) Subject to any special statutory provisions, the plaintiff may, at any time before the receipt of the statement of defence of any defendant, or after the receipt thereof before taking any other proceeding in the action (save an interlocutory application) by notice in writing, filed and served, wholly discontinue his action against such defendant or withdraw any part thereof; and the defendant shall be entitled to the costs of the action, if wholly discontinued against him, or if not wholly discontinued to the costs occasioned by the part withdrawn. A plaintiff may discontinue as to one or more of several defendants.

(3) Such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action.

(4) Save as in these Rules otherwise provided, it shall not be competent for the plaintiff to discontinue the action without leave of the Court or a Judge, but the Court or a Judge may,

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before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action against all or any of the defendants, and otherwise, order the action to be discontinued, or any part of the alleged cause of complaint to be withdrawn.

The motion was heard by Mr. Wichester, the Master in Chambers, on the 3rd March, 1902.

*C. A. Moss*, for the plaintiffs.

*F. E. Hodgins*, for the defendant, contended that the plaintiffs should not be allowed to discontinue if the effect was to deprive the defendant of his counterclaim, or should be allowed to discontinue only upon the terms that the defendant should be allowed to proceed with his counterclaim without any question being raised as to a cause of action arising within the jurisdiction.

March 5. THE MASTER IN CHAMBERS:—The defendant has delivered a defence and counterclaim, and asks that he be at liberty to proceed with his counterclaim as a term of allowing the plaintiffs to discontinue. The plaintiffs object to any such term being imposed upon them; they are willing to allow the defendant to proceed with his counterclaim if, under the law and practice of this Court, he is entitled to do so; but they contend that no terms should be imposed upon them giving the defendant any right to do so.

*McGowan v. Middleton* (1883), 11 Q.B.D. 464, is relied upon by the defendant for what he asks. That case, however, only decides that by discontinuing an action after a counterclaim has been delivered a plaintiff cannot put an end to it so as to prevent the defendant from enforcing against him the causes of action contained in the counterclaim; it did not go so far as to hold that the defendant was entitled to proceed, after such discontinuance, with a counterclaim which the bringing of the action alone permitted him to make.

It is contended that the cause of action upon which the counterclaim is founded is one for which the defendant could not issue and serve a writ of summons under Rule 162.

The cases shew that the counterclaim has the same effect as a statement of claim in a cross-action, and, such being the case, that discontinuing the original action does not discontinue the



counterclaim; but no case has gone so far as to decide that a plaintiff having discontinued an action is not at liberty to defend himself from the counterclaim as fully as a defendant would be entitled to defend himself from the original writ of summons.

In my opinion, the cases have gone sufficiently far to shew that the plaintiff in the action has the same rights as against the defendant who delivers a counterclaim, so far as the counterclaim goes, as the defendant has against the plaintiff in the action: see *Ellis v. Munson* (1876), 35 L.T.N.S. 585; *Winterfield v. Bradnum* (1878), 3 Q.B.D. 324; and the other cases referred to in *McGowan v. Middleton*.

The usual order allowing the plaintiffs to discontinue may go.

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Feb. 15.

*Extradition—Contempt of Foreign Divorce Judgment—Parent Stealing his own Child—Evidence of Foreign Law—Onus—Criminal Code, 55-56 Vict. ch. 29, sec. 284 (D.).*

The prisoner and his wife were absolutely divorced in the State of Illinois, U.S., where they were domiciled, by a decree which gave the custody of their child, five years of age, to the wife, with permission to the prisoner to take it out in the day time, returning it the same day. The prisoner having thus obtained the child, carried it away to Canada:—

*Held*, on extradition proceedings, that “child-stealing” is an extraditable offence, and the evidence taken before the extradition commissioner shewing this to be a case of child stealing under sec. 284 of the Criminal Code, 55-56 Vict. ch. 29 (D.), was sufficient to warrant the extradition of the prisoner in the absence of evidence of foreign law, as the Court would assume the crimes to be identical in the two countries.

*In re Murphy* (1894-5), 26 O.R. 163, 23 A.R. 386, followed.

Sec. 284 of the Criminal Code does not exclude the case of a father and child. A crime does not become any the less a crime because it also happens to be a contempt of Court, as in this case.

*Held*, also, that the prisoner's contention that he had acted in good faith because he had been advised that the divorce decree, having been obtained collusively, was a nullity, would be proper matter of defence on the trial, but could not be dealt with by the magistrate, who had before him the foreign decree and the wife's oath that she did not collude.

THE prisoner was committed by the extradition commissioner at Windsor, in the county of Essex, for extradition for child stealing committed in the State of Illinois.

A writ of *habeas corpus* was issued, and the proceedings were brought up on *certiorari*. On the return of the writs the counsel for the prisoner moved for his discharge upon the grounds appearing in the judgment.

The motion was argued on January 31st, 1902, before STREET, J., in Chambers.

A. B. Aylesworth, K.C., and F. A. Anglin, for the defendant, contended there had been no offence indictable under our law; that there had only been a disobedience of an order of a foreign Court; and that there was a waiver of the regulation as to returning the child the same day: *In re Gross* (1898), 25 A.R. 84, 86; R.S.C. ch. 142, sec. 11; the 10th Article of the Ashburton Treaty of 1842 (see Imp. 6-7 Vict. ch. 76); the Convention between the United States and Great Britain of July 12th, 1889, in Dominion Statutes of 1890, 52-53 Vict., at p. xliii;

the Criminal Code, 55-56 Vict. ch. 29, sec. 284, relating to the stealing of children under 14; also *ib.* secs. 264, and 283.

G. F. Shepley, K.C., for the Crown, stated that he would confine his argument to sec. 284.\*

Aylesworth, continuing, contended that a parent cannot steal his own child; the possession was rightful, only the detention was objected to: *The Queen v. Flowers* (1886), 16 Q.B.D. 643; *Regina v. Olifer* (1866), 10 Cox C.C. 402; that there was no evidence of the foreign law: *In re Phipps* (1883), 8 A.R. 77; *Re Murphy* (1894-5), 26 O.R. 163, 177, 22 A.R. 386; *The Queen v. The Governor of H.M. Prison at Holloway* (1900), 16 Times L.R. 247; *Re Arton*, [1896] 1 Q.B. 509, 510, 516-7; *Ex parte Seitz* (No. 2) (1899), 3 Can C.C. 127; *Sussex Peerage Case* (1844), 11 C. & F. 85, 114, 117; Taylor on Evidence, 9th ed., secs. 1423, 1425, 1525; that the decree was collusive and such as no Court would give effect to: *Bonaparte v. Bonaparte*, [1892] P. at p. 410; *Duchess of Kingston* (1776), 20 How. St. T. at p. 479; *In re Belencontre*, [1891] 2 Q.B. 122; *Churchward v. Churchward*, [1895] P. 7; *Hollender v. Ffoulkes* (1894), 26 O.R. 61; *Vadala v. Lawes* (1890) 25 Q.B.D. 310; *In re John Anderson* (1857), 11 C.P. 1, 25.

Shepley, for the Crown, as to there being no proof of the offence charged being one under the law of Michigan, cited *Re Murphy*, 26 O.R. 163, 22 A.R. 386; R.S.C. ch. 142, sec. 2, sub-sec. (b), and sec. 9; and contended that the English cases cited do not shew that foreign law must be proved, but only that there must be an enquiry as to whether the crime is extraditable; that sec. 284 of the Criminal Code does not exclude a parent; that other questions raised were mere matters of defence to be urged at the trial; that where there is something in a contempt of Court

\*284. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to deprive any parent or guardian, or other person having the lawful charge, of any child under the age of fourteen years, of the possession of such child, or with intent to steal any article about or on the person of such child unlawfully,—

(a) takes or entices away or detains any such child; or

(b) receives or harbours any such child knowing it to have been dealt with as aforesaid.

2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child.

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which includes a criminal act, the latter is a proper subject for indictment; that the question as to good faith in the original taking of the child was one for the jury.

*Anglin*, in reply, cited Paley on Conviction, 7th ed., pp. 132, 198; *Commonwealth v. Myers* (1892), 146 Penn. 24.

February 15. STREET, J.:—The evidence taken before the commissioner shews that the prisoner was married in 1895, his wife being the complainant Mary E. Watts, and that they had their domicile in the State of Illinois, where they were married. In the year 1900 a decree of divorce was obtained by the wife upon the ground of cruelty, and the marriage was absolutely dissolved, and ordered to be forever held at naught. The child in question was born in 1897, and by the terms of the decree the care and custody of it were given to the wife, Mary E. Watts, with permission to the prisoner to see it at all suitable times, "and to take it out riding with him in the day time as he may wish, but to return it to the complainant the same day."

The prisoner, after the decree, frequently called at the complainant's house for the child and took it for a drive, returning it sometimes on the same day, sometimes the next day. One day he called and obtained the child as usual, but instead of returning it, he carried it off at night out of the State, and eventually brought it to Canada. The grand jury of the county of Sangaman in the State of Illinois, from whence the child was so taken, found a true bill against the prisoner, containing the charge under several heads, one of which is, that the prisoner "did wilfully, and without lawful authority, forcibly and feloniously, take and carry away one Catharine H. Watts, an infant under the age of 12 years, without the consent of the lawful custodian of such child, contrary to the form of the statute in such case made and provided," etc.

Another count charges the same offence, omitting the word "forcibly," and adding that the child was taken away with intent to deprive its lawful custodian of its custody.

The first objection is that no evidence was given before the commissioner that the circumstances above referred to constitute a crime under the law of the foreign State.



The cases upon the point raised by this objection are extremely conflicting. A number of them are referred to in the comparatively late case of *Re Murphy*, 26 O. R. 163, 177, and 22 A.R. 386. See also *Re Bellencontre*, [1891] 2 Q.B. 122; *Re Arton*, [1896] 1 Q.B. 509; *Ex parte Seitz* (No. 2) 3 Can. C.C. 127.

The decision of the Divisional Court in *Re Murphy*, upon the point now under consideration, was sustained in the Court of Appeal by an equal division of opinion in the members of the Court, and I think I should follow it. In any event, my view of the proper course to be taken under the statute in the present case is in accord with the opinion expressed by the Divisional Court in that case. It seems to me, to take an extreme case, that if the crime charged were murder, and the facts sworn to before the extradition commissioner were such as would constitute that crime under our law, it would be unnecessary for the Crown to prove that the same facts also supported a charge of murder in the foreign State. In the present case we find the crime of "child stealing" mentioned in the Treaty as one of the extradition crimes, and I think we should, in the absence of any evidence to the contrary, assume the crimes to be identical in the two countries. It seems to me that, under sub-sec. 3 of sec. 9 of the Act, R.S.C. ch. 142, it would have been competent for the prisoner to shew that the crime of child stealing under the foreign law was not covered by the facts deposed to here, and if that were done, then, I think, the prisoner should be discharged; but in the absence of any such evidence the objection should not prevail.

Another objection is, that the facts in evidence do not under our law shew the crime of child stealing, within the meaning of our statute, to have been committed, and there is perhaps room for differences of opinion as to whether a father could be charged under the Act with stealing his own child. After a great deal of consideration, I have been unable to see why the statute, sec. 284 of the Criminal Code, should not cover a case of this kind. By the decree of a Court of competent jurisdiction in an action to which he was a party, and of the result of which he was fully aware, he was deprived of his right to the custody of the child, his marriage ties were absolutely dissolved,

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and the mother of the child became its sole custodian, subject to certain limited rights, as to the extent of which there could be no misapprehension.

There was, from the time of this decree, only one person entitled by law to the custody of the child, and that person was its mother, and I can find no good reason, under such circumstances, why the father, wilfully removing the child, as he is sworn to have done, from the custody of the mother, should be held to be excepted, by reason of his relationship to the child, from the operation of the Act. It was argued that what he did was a mere contempt of Court. It is quite true that it was a contempt and disobedience of the judgment of the Court, but if a man has committed a crime it does not become less a crime because it also happens to be a contempt.

I think this objection must also fail.

The remaining objection is, that the prisoner acted in good faith and under the belief that he was legally entitled to the custody of the child. The reason given for this belief is that he says he had been advised that the decree of divorce was a nullity because, he says, it was obtained by collusion between himself and his wife. It was said that the fact of its having been obtained collusively is not denied, but I see that the complainant does deny it. This is an objection, however, in my opinion, which may properly be set up as a defence by the prisoner upon his trial, but which could not properly be dealt with by the magistrate who had before him the decree of the foreign Court, and the oath of the complainant that she did not collude.

For these reasons I think the objections should be overruled and the prisoner remanded.

A. H. F. L.

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[BRITTON, J.]

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Feb. 1.

*Company—Prospectus—Unreasonable Delay—Subscription for Shares—Departure from Prospectus—Res Judicata—R.S.O. 1897, ch. 191, sec. 9.*

On January 28th, 1899, defendant and others subscribed for shares in a projected hotel company. The prospectus stated that a charter would be applied for forthwith and building commenced as soon as \$40,000 had been subscribed, at an estimated cost of \$45,000, to be ready by the summer season of 1899. After March 29th, 1899, by which time only \$28,700 had been subscribed, no further subscriptions to stock were taken till October 24th, 1899, nor was the company incorporated, nor anything done towards having the hotel ready by the time mentioned. After October 24th, 1899, however, additional subscriptions were obtained which shortly brought the total subscribed to \$40,150. On November 24th, 1899, the company was incorporated, and about July 1st, 1900, the hotel was completed at a cost however of about \$15,000 over the estimated figure. There was no evidence that the defendant had at any time after October 1st, 1899, agreed to be bound by his subscription or approved of proceeding with the erection of the hotel, or of the cost subsequently incurred in its erection:—

*Held*, under the above circumstances, as the undertaking had not been proceeded with within a reasonable time from its inception, defendant could not now be held bound by his subscription to take shares.

*Semble*, that the fact that in an undefended action brought by defendant against the company judgment had been recovered by the defendant, which contained a declaration of the Court that he was not a shareholder, did not in itself afford any defence in this action brought against him to compel him to pay for the shares he had subscribed for.

The change in the law contained in the present Ontario Company's Act, R.S.O. 1897, ch. 191, sec. 9, as to who become shareholders in a company incorporated by letters patent, specially referred to.

THIS was an action to recover \$600 from the defendant Turner in respect to certain shares subscribed for by him, under the circumstances in the judgment mentioned, and was tried at Hamilton, on November 18th, 1901, before BRITTON, J., without a jury.

A. B. Aylesworth, K.C., for the plaintiff, referred to *Trustees of the Toronto Berkeley Street Church v. Stevens* (1875), 37 U.C.R. 9; *Tilsonburg Agricultural Manufacturing Co. v. Goodrich* (1885), 8 O.R. 565; *In re North Shields Quay and Improvements Co., Davidson's case* (1858), 4 K. & J. 688.

Lynch Staunton, K.C., for the defendant Turner, contended that the first agreement never had become operative; that it was abandoned, and the present project was a new one; and that it was the plaintiff's business to enquire into the condition

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of affairs when he signed: *In re Land, Loan, Mortgage and General Trust Co. of South Africa, Ex parte Boyle* (1885), 33 W.R. 450; *Downes v. Ship* (1868), L.R. 3 H.L. 343; Palmer's Company Precedents, 6th ed., pp. 57, 58, 60.

*S. F. Washington*, K.C., for the defendant the Hotel Brant Company.

*Aylesworth*, in reply, denied that there had been an abandonment or that the present was a new project; that as soon as the \$40,000 was subscribed the agreement sprang into force; and no one could recede without the consent of and notice to the others: *Directors, etc., of the Ashbury R.W. Carriage and Iron Company v. Riche* (1875), L.R. 7 H.L. 653; *British and American Trustee and Finance Corporation v. Couper*, [1894] A.C. 399. He also cited, as to the plaintiffs' right to sue, *Faulkner v. Faulkner* (1893), 23 O.R. 252; *Gandy v. Gandy* (1884), 30 Ch. D. 57; *Tweddle v. Atkinson* (1861), 1 B. & S. 393.

February 1. BRITTON, J.:—The action is brought by the plaintiffs, suing on behalf of themselves and all other subscribers to the agreement to take stock in the Hotel Brant Co., Limited, to recover from the defendant Turner \$600, amount of par value of twelve shares which Turner agreed to take.

On January 28th, 1899, Turner and others signed an agreement which is in these words:

"Stock Book of the Hotel Brant Company of Burlington,  
"Limited.

"To be incorporated under the Ontario Companies Act. Capital  
"stock, \$50,000, in 1,000 shares of \$50 each.

"We, the undersigned do hereby severally, and not one for the other, subscribe for and agree to take the respective amounts of the capital stock of the above named company set opposite our names, as hereinunder and hereafter written, and we do covenant and agree each with the other, to pay the amounts so subscribed as the same may be called in by the directors of the company; and we do further covenant and agree to abide by and observe the provisions of the letters patent of incorporation, and the by-laws, rules and regulations of the said company, to be made in pursuance of its charter or



of the said Act. No subscription to be binding until \$40,000 has been subscribed hereon by persons whose financial ability is satisfactory to the majority in value of subscribers."

This agreement is in a book, and in this book, preceding the agreement, is a prospectus. The company, if any, was to build in accordance with that prospectus.

The prospectus states that "this company is being formed for the purpose of acquiring the Brant House property at Burlington and erecting a large first-class and commodious summer hotel." The need of such an hotel is stated. The beauty of the situation, and all the attractive features of it, are commented on, and then it states that the estimated cost of all is \$45,000, and that "it is the intention to apply for a charter at once, and to commence building operations as soon as \$40,000 of the stock has been subscribed, and to have the buildings completed, and ready for opening, at the beginning of the summer season of 1899."

The prospectus bears no date, nor does the agreement, apart from dates to the names attached. The first subscription is that of A. B. Coleman for 200 shares, Nov. 17th, 1898, then follow several, of whom defendant Turner is one, dated January 28th, 1899, and then there are subscriptions of different dates after January 28th and down to March 29th, 1899. At that date there was a halt. Taking subscriptions was not further proceeded with, and the company was not formed, nor was there anything done towards getting the proposed hotel ready for occupation by the beginning of the summer season of 1899. Prior to October 24th, 1899, apart from any question of the financial ability of those who had subscribed being satisfactory to the majority in amount of all the subscribers, the whole amount then subscribed was only \$28,700—considerably under the \$40,000 stipulated for. The subscribers might reasonably consider that the project had failed. On October 24th the plaintiff Patterson became interested, and on that day signed the book for 100 shares, \$5,000, the plaintiff Kammerer on November 10th, 1899, signed for ten shares, and on November 15th, 1899, A. B. Coleman, who was the first subscriber, became also the last, signing for \$3,500, bringing the total up to \$40,150.

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Letters patent incorporating the company issued on Nov. 24th, 1899, with the capital stock named as \$50,000. The hotel was completed about July 1st, 1900, and it cost considerably more—about \$15,000 more—than was originally contemplated. So far the venture has not proved profitable, and the defendant resists any and every attempt to make him pay. He raises the defence that as the subscriptions were not obtained to the amount stipulated in time to have the project gone on with in the early part of 1899, it was practically abandoned, and that the attempt of new subscribers to galvanize into life the old scheme, and to attempt to hold on to such of the old subscribers as do not wish to have the stock, is fraudulent.

The defendant also says that, as, in an action brought by him against "The Hotel Brant Company, Limited," judgment was recovered by the defendant, and as it was by that judgment declared that the defendant was not a stock holder of the defendant company, he cannot be made liable in this action.

I am of opinion that the judgment in favour of the defendant against the company does not in itself afford any defence in this action.

The question is not now as to the liability of the defendant to the company for unpaid calls as a shareholder in the company.

Apparently in an undefended action the defendant has obtained a declaration of the Court that he is not a shareholder. There is a very important change in the law as to who become shareholders in a company incorporated by letters patent under R.S.O. 1897, ch. 191.

The Act, R.S.O. 1887, ch. 157, sec. 4, provides that "the Lieut.-Governor in Council may grant a charter to any number of persons not less than five, who shall petition therefor, *constituting such persons and others who may become shareholders in the company thereby created*, a body corporate, etc.

R.S.O. 1897, ch. 191, sec. 9, provides that "the Lieut.-Governor in Council may by letters patent grant a charter to any number of persons not less than five, who petition therefor, creating and *constituting such persons, and any others who have become subscribers to the memorandum of agreement*, a body corporate, etc.

The form of memorandum of agreement is given in Schedule A, and is authorized by sec. 10, sub-sec. 2, of the last-mentioned Act.

No evidence was given of the particular memorandum of agreement sent to the Provincial Secretary with the petition for the letters patent incorporating this company. The agreement produced appears from the marks upon it to have been before the Provincial Secretary on the application, but I cannot assume that it is the agreement mentioned in the letters patent, the signers to which are incorporated.

The agreement should be in duplicate: see sec. 10, sub-sec. 2.

If this was the agreement produced and accepted by the Governor in Council as an agreement "in its essential features" complying with the statute, then the persons named in the agreement were constituted the body corporate: see sec. 9; and if this had been shewn in the action by the defendant against the company, the result might have been different.

But this is not an action against the defendant as a shareholder. It is simply an action upon his agreement to compel him to accept the shares and pay for them. It was decided in the old case of *Kidwelly Canal Co. v. Raby* (1816), 2 Price, 93, that "one of several persons who have subscribed an agreement *inter se*, to promote a joint undertaking or common purpose, cannot withdraw his name and discharge himself from the engagement without the consent of the rest of the subscribers." In that case an Act of Parliament was passed for carrying out the undertaking, and during the progress of the bill one of the subscribers appeared before the committee and renounced all further connection with the undertaking and desired his name omitted. His name was omitted, but it was held that he was not exonerated.

The difficulty in the way of the plaintiffs' recovery here is that the plaintiffs did not subscribe within a reasonable time after the defendant and others had become parties to the agreement. Without saying that there is any day limit, I am of opinion that in order to make the agreement operative and binding upon any one to the others, the whole undertaking should have been proceeded with within a reasonable time from its inception. What is a reasonable time is a question to be

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determined upon all the facts and circumstances before me. I do not think the plaintiff is entitled, coming in as he did in October, to hold the defendant to what defendant was willing, upon certain terms, to agree to in the January before. This agreement had reference to the building of an hotel which was to be completely built and ready for occupation by the beginning of the summer season of 1899, and to be built by a company to be formed at least within a reasonable time after January, 1899, and to be formed by men of financial ability who would subscribe to the amount of at least \$40,000. New parties, of whom plaintiff is one, cannot come in, months after the time when the hotel was to have been ready, and, by subscribing for the balance of amount of stock originally named, bind unwilling original subscribers, who, in the meantime, have placed themselves in entirely changed relations to the project.

The plaintiffs, in reply to the delay, say that before they signed the book there was a meeting of the subscribers, at which the defendant was present, and that, going on with the hotel was with defendant's consent and approval.

There was a meeting of those interested in the hotel project, and probably held on October 18th, 1899. There is nothing very definite about this. Defendant says he has no recollection of being present at that meeting; but at that time the Radial Railway Company, in which defendant was interested, had been taken over by the Cataract Power Company, and the plaintiff Patterson had succeeded defendant Turner as president. It was well known to Patterson that if Turner had subscribed to the hotel project by reason of being interested in the Radial Railway, that interest had ceased. The fact, no doubt, was as put by defendant in his letter of December 13th, 1899, to the plaintiff Kammerer, then secretary of the hotel company.

Upon the evidence I am not able to find that at any time after October 1st, 1899, the defendant Turner agreed to be bound by his subscription, or that he approved of and agreed to proceeding with the erection of the hotel of the size of the hotel which was afterwards erected, and at the cost it was afterwards erected at, nor can I find that the plaintiffs signed the book and paid their subscriptions relying upon the approval and consent of defendant Turner.



It can hardly be said, in face of defendant's letter of December 13th, 1899, that defendant stood by and allowed plaintiffs to suppose that he consented.

It is true that the company had then been incorporated, but the contract for the hotel was not given until January 19th, 1900, and there was then time for plaintiffs to learn exactly how matters stood before going into the very large expenditure.

If there was evidence of the assent of defendant Turner to going on with the project after the apparent abandonment of it in the spring of 1899, and after the change in the position of the Radial Railway, he should not be permitted to escape because of any promise by any other subscriber to take the shares off his hands. That would not be a defence: see *In re North Shields Quay and Improvement Co.*, *Davidson's case*, 4 K. & J. 688: but defendant's letter is some evidence to shew that plaintiffs did not rely upon defendant's subscription, and it is some evidence that the original subscription list was dropped and the project abandoned. It was taken up afresh in October, 1899, and, in so far as the parties agreed to continue, it was binding, but those who chose to drop out could, in my opinion, legally do so.

Judgment for defendant, dismissing action with costs.

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## [DIVISIONAL COURT.]

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TAYLOR ET AL. V. DELANEY ET AL.

March 15.

*Appeal from Surrogate Court—Court of Appeal—Form of Notice and Bond—  
Motion to Quash.*

On a motion to quash an appeal from a surrogate court to a Divisional Court subsequent to the passing of 58 Vict., ch. 13, sec. 45 (O.), which transfers such appeals from the Court of Appeal to a Divisional Court, on the ground that the notice of appeal did not specify the Court, to which the appeal was taken and that the bond filed followed the surrogate form "to the Court of Appeal":—

*Held*, that the intention to appeal expressed in the notice was sufficient, and that the words "the Court of Appeal" in the bond might be read as an equivalent of "the proper appellate tribunal."

THIS was a motion by the plaintiffs to quash an appeal by the defendant Patrick Delaney from the surrogate court of the county of Essex on the grounds that the notice of appeal did not specify the Court to which the appeal was taken, the form used being: "Take notice that the above named Patrick Delaney intends to appeal, and hereby appeals, from the judgment pronounced in this action by His Honour Charles Robert Horne, on the 11th day of January, 1902, whereby it was adjudged that the will in question herein is the last will and testament of the said Rose Taylor, deceased, and that the same should be admitted to probate"; and that the bond given as security for costs, filed January 23rd, 1902, was for an appeal to "the Court of Appeal" and not to a Divisional Court, the form used being No. 35 in the appendix to the surrogate court rules of 1892.

The motion was argued on the 3rd March, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET, and BRITTON, JJ.

*J. H. Moss*, for the plaintiffs and for the defendants other than Patrick Delaney. The security required by the surrogate court rules is a condition precedent to the jurisdiction to entertain the appeal. The Court has not power to extend the time for giving such security, or to allow or amend a defective security. The bond filed is no security for an appeal to the Divisional Court, and could not be enforced against the sureties

should an appeal prove unsuccessful: *Re Nichol* (1901), 1 O.L.R. 213; *Re Wilson, Trusts Corporation of Ontario v. Irvine* (1897), 17 P.R. 407.

*F. A. Anglin*, for Patrick Delaney, the appellant. The words "Court of Appeal" used in the bond (not "Court of Appeal for Ontario") are in effect equivalent to "Divisional Court," which is now the Court of Appeal from surrogate courts. The rules and orders and the forms of the surrogate courts have not been amended since 58 Vict., ch. 13, sec. 45 (O.), which changed the appellate tribunal from the Court of Appeal to a Divisional Court of the High Court. Form 35, prescribed by surrogate rule 73, has been strictly followed. In any event the High Court practice is applicable: Howell, p. 610, Rule 3. Supreme Court rule 830 (7) requires a respondent to move for the disallowance of a bond filed as security on an appeal within fourteen days. This has not been done. The bond therefore stands allowed. The respondents by allowing the February sittings of the Divisional Court to pass without moving, and permitting the appellant to incur the expense of procuring the evidence, etc., have waived their right, if any, to have this appeal quashed. The security and its form being prescribed by surrogate court rules and not by statute, the Court has power to amend if defective and to extend the time: *Park Gate Iron Co. Limited v. Coates* (1870), L.R. 5 C.P. 634.

*Moss*, in reply.

During the argument the Court held that the notice of appeal was sufficient; when the intention to appeal was plainly expressed it would be read as if the Court to which the appeal should go (the Divisional Court) had been named.

March 15. FALCONBRIDGE, C.J.:—By 58 Vict., ch. 13 (the Law Courts Act. 1895) sec. 45, appeals from the surrogate court were transferred from the Court of Appeal to a Divisional Court of the High Court.

But no corresponding change in the surrogate court rules or forms has been made. And in Mr. Howell's 2nd edition (partly re-written, according to the preface, since the Law Courts Act of 1895) the old form of bond appears at page 602.

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It is a case in which we ought, if we can, to relieve the appellant from the harsh application of the rule laid down in *Re Nichol*, 1 O.L.R. 213.

The bond recites that the appellant "desires to appeal to the Court of Appeal." It does not say to the "Court of Appeal for Ontario," and the words may well be read as equivalent to the "proper appellate tribunal," just as in the original Criminal Code, 1892, the expression "Court of Appeal," in secs. 742 *et seq.*, included any division of the High Court of Justice.

I think the motion to quash ought to be dismissed without costs.

STREET, J.:—The question is whether the sureties upon the bond put in upon the present appeal would be liable to the respondent upon it in case judgment were to go in his favour, and I am clearly of opinion that they would. The bond must be interpreted in view of the law as it stood at the time it was executed. An appeal lay from the judgment to the Divisional Court; none lay to the Court of Appeal for Ontario. There was, therefore, only one Court to which an appeal could be had, and that may fairly be taken to have been "the Court of Appeal" mentioned in the bond.

The motion to quash should therefore be dismissed without costs.

BRITTON, J., concurred.

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## [DIVISIONAL COURT.]

## ROSE V. CRODEN.

1902

March 4.

*Pleading—Statement of Claim—Amendment—Writ of Summons—Two Causes of Action—Election to Pursue One—Penalty—Discovery—Dominion Elections Act, 1900.*

The writ of summons (issued 30th January, 1901) was indorsed with a claim to recover penalties under the Dominion Elections Act, 1900, and for damages for wrongfully depriving the plaintiff of his vote at an election held on the 7th November, 1900. The statement of claim (delivered 14th March, 1901) did not assert any claim to penalties, but was confined to the common law cause of action. The statement of defence (delivered 27th March, 1901) denied the allegations of the statement of claim and alleged want of notice of action. The plaintiff obtained the usual discovery from the defendant, without objection. On the 31st December, 1901, after such discovery, and when the action was ready for trial, the plaintiff applied for leave to amend the statement of claim by adding a claim for the penalties mentioned in the indorsement of the writ:—

*Held*, that the defendant in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery.

*Regina v. Fox* (1898), 18 P.R. 343, distinguished.

The plaintiff, having by proceeding at common law obtained from the defendant the discovery which he could not have had in an action for penalties, and having allowed more than a year to elapse before applying for leave to amend, must, notwithstanding the indorsement of the writ, be taken to have conclusively elected to pursue his common law remedy; and leave to amend was properly refused.

Sections 19, 131, 133, and 142, of the Dominion Elections Act, 1900, discussed.

THIS action was begun by writ of summons issued on the 30th January, 1901, indorsed with a claim to recover \$1,200 for penalties under the Dominion Elections Act, 1900, by reason of wilful misfeasance, act, or omission on the defendant's part in violation of the said Act, and for wrongfully depriving the plaintiff of his right to vote at the election held on the 7th November, 1900, of a member to serve in the House of Commons of Canada for the electoral division of the city of London. Attached to the writ of summons was a notice that the plaintiff had paid into Court the sum of \$50 as security for costs, under sec. 131 of the Dominion Elections Act, 1900.\*

\*131. All penalties and forfeitures (except in cases of indictable offences and offences made punishable on summary conviction) imposed by this Act shall be recoverable or enforceable with full costs of suit by any person who sues therefor by action of debt or information, in any court of competent jurisdiction in the province in which the cause of action arises, and in default of payment of the amount which the offender is condemned

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The statement of claim in the action was filed and served on the 14th March, 1901. The plaintiff set out in it that the defendant had acted as a deputy returning officer at the election on the 7th November, 1900, and that the plaintiff was entitled to vote at the polling place at which the defendant was acting; that the defendant supplied the plaintiff with a ballot paper which the plaintiff marked and handed to the defendant to be placed in the ballot box, but the defendant, contriving and falsely and maliciously intending to damnify the plaintiff in that behalf, and wholly to hinder and disappoint him of his right and privilege in the premises, did wilfully refuse to place the said ballot paper in the ballot box, and did spoil the said ballot paper, whereupon the plaintiff demanded from the defendant, as such deputy returning officer, another ballot paper for the purpose of enabling him to vote, but the defendant, as such deputy returning officer, wilfully refused to furnish the plaintiff with another ballot paper, and did then and there wrongfully and unlawfully hinder and prevent the plaintiff from giving his vote at the said election, and did not receive or allow the vote of the plaintiff at the said election. The plaintiff claimed \$1,000 and costs of action.

The defendant, on the 27th March, 1901, filed and served his statement of defence, denying the allegations in the statement of claim and pleading that no notice of action had been served upon him.

The plaintiff then proceeded to examine the defendant for discovery, without objection, and took out an order for production of documents, which was complied with.

The action was not entered for trial until the Winter Assizes for London held on the 6th January, 1902.

On the 31st December, 1901, the plaintiff applied to one of the local Judges of the High Court at London for leave to

to pay, within the period fixed by the court, the offender shall be imprisoned in the common gaol of the county or district for any term less than two years, unless such penalty and costs are sooner paid; but no action or information for the recovery of any such penalty or forfeiture shall be commenced unless the person suing therefor has given good and sufficient security, to the amount of \$50, to indemnify the defendant for the costs occasioned by his defence, if the person suing is condemned to pay such costs.

amend his statement of claim by adding at the end thereof the words: "And the defendant acted contrary to the Dominion Elections Act, 1900, and is indebted to the plaintiff in the sum of \$1,000."

This motion was referred by the local Judge to the presiding Judge at the then ensuing Winter Assizes, and it came before FERGUSON, J., on the 7th January, 1902, and was dismissed by him, after argument, upon the ground that the amendment would convert the action from an ordinary common law action for damages into the penal action given by the Dominion Elections Act, 1900, sec. 19,\* and make him subject to the pains and penalties provided by sec. 131, including an imprisonment for two years in default of payment of the penalty provided by sec. 19; and that such a charge should not be made after the defendant had submitted to discovery under the common law form of action.

The plaintiff did not proceed with the trial of the action, and appealed from the order of Ferguson, J.

The appeal was heard on the 22nd January, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ.

*N. W. Rowell*, for the plaintiff, contended that an amendment should be allowed at any time; that there was no authority for treating this action in a different way from any other action; that the failure to refer in the statement of claim to the Dominion Elections Act was by inadvertence; and that the action was actually for the statutory penalties, as shewn by the indorsement of the writ. He referred to *Chatterton v. Thomas* (1867), 36 L.J.N.S. Ch. 592; *Cropper v. Smith* (1884), 26 Ch. D. 700, 710; *Williams v. Leonard* (1895), 16 P.R. 544, 547; *Weldon v. Neal* (1887), 19 Q.B.D. 394; *Rodger v. Noxon Co.* (1900), 19 P.R. 327.

*G. C. Gibbons*, K.C., for the defendant. On principle a penal action is different from any other. The defendant might

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\* 19. Every officer and clerk who is guilty of any wilful misfeasance or any wilful act or omission in violation of this Act shall forfeit to any person aggrieved by such misfeasance, act or omission, a sum not exceeding \$500, in addition to the amount of all actual damages thereby occasioned to such person.

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be imprisoned if judgment were given against him for a penalty and he did not pay as adjudged: sec. 131 of the Act. The statement of claim is just as if in a common law action. The plaintiff must be taken to have elected to abandon his claim for statutory penalties. He merely claims damages for the defendant's malicious refusal to give him a ballot paper. And he now comes for this amendment two months after the expiration of the statutory period: sec. 142 of the Act. The plaintiff did everything which he could not do in a penal action before he applied for the amendment. He obtained full discovery from the defendant, and there can be no discovery in an action for penalties: *Malcolm v. Race* (1894), 16 P.R. 330; *Saunders v. Wiel*, [1892] 2 Q.B. 321. The plaintiff has elected, and it is too late for him to amend. I refer to *Hudson v. Fernyhough* (1889), 61 L.T.N.S. 722; *Clark v. Wray* (1885), 31 Ch. D. 68; *Raleigh v. Goschen*, [1898] 1 Ch. 73, 81.

*Rowell*, in reply. The plaintiff has not elected by obtaining discovery, because he could examine as to the common law cause of action, if he had both, and by statute he has the right to damages as well as the penalty: *Regina v. Fox* (1898), 18 P.R. 343.

March 4. STREET, J. (after setting out the facts as above):—The plaintiff, having two remedies open to him, one his common law action for damages, and the other his statutory action under the 19th, 131st, and 133rd \* sections of the Dominion Elections Act, 1900, appears to have issued his writ claiming the penalties, but to have altered the frame of his action when he came to deliver his statement of claim, and to have then claimed only at common law; for the distinguishing characteristics of the action for penalties pointed out by the 131st section of the Act are not to be found in his pleading. It appears to be necessary to preserve in some way a clear line

\* 133. It shall be sufficient for the plaintiff, in any action or suit under this Act, to allege in his pleading or declaration that the defendant is indebted to him in the sum of money thereby demanded, and to allege the particular offence with respect to which the action or suit is brought, and that the defendant has acted contrary to this Act, without mentioning the writ of election or the return thereof.



between the two classes of action, because of the plaintiff's right in the statutory action to have the defendant committed to prison in case of non-payment of the amount of the penalties for which judgment is given, as well as on account of the time allowed for bringing that action and for other reasons.

The defendant, treating this as a common law action, submitted to discovery in it without objection. The question whether the defendant might have successfully resisted discovery in case the action had been brought for the penalties given by sec. 19, does not seem to me to be covered by the decision in *Regina v. Fox*, 18 P.R. 343, by reason of the special provisions of sec. 134, which must, I think, be taken to be substituted, in actions brought under the Elections Act, for the general provisions of the Canada Evidence Act, upon which that case turned. Section 134 provides that "In any such civil action, suit or proceeding," that is to say, in any action to recover the penalties given by the Act, "the parties thereto, and the husbands or wives of such parties respectively, shall be competent and compellable to give evidence to the same extent and *subject to the same exceptions* as in *other* civil suits in the same province; but such evidence shall not thereafter be used in any indictment or criminal proceeding under this Act against the person giving it."

This section seems to introduce into actions for penalties under the Act the same exceptions to the general rules regarding discovery as exist in ordinary civil actions, under the laws of the Province. One of these rules undoubtedly is, that discovery will not be compelled from a defendant in an action to recover penalties: *Martin v. Treacher* (1886), 16 Q.B.D. 507; *Saunders v. Wiel*, [1892] 2 Q.B. 321; *Mexborough v. Whitwood Urban District Council*, [1897] 2 Q.B. 111.

The decision of *Regina v. Fox*, 18 P.R. 343, turned upon a provision in the Canada Evidence Act which was held to govern the case, and not upon the general provincial law of evidence; it does not, therefore, establish a rule generally applicable to civil suits in this Province.

I think, therefore, that the defendant in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery: in an ordinary

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common law action he was of course bound to submit to examination, and he did so.

Having by proceeding at common law obtained from the defendant the discovery which he could not have had in an action for penalties, he then applied to amend his statement of claim by turning his action into one for penalties. At the time he made the application, more than a year had expired since the act complained of was committed, and he could not have brought a new action for the penalties: see sec. 142 \* of the Act.

I think, under the circumstances, that, notwithstanding the indorsement upon the writ, the plaintiff must be taken to have conclusively elected to pursue his common law remedy, and that the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—The plaintiff, having by the indorsement of his writ of summons claimed both penalties under the Dominion Elections Act and damages at common law, seems to have deliberately elected in his statement of claim to proceed as at common law only, and on that basis of procedure he obtained from the defendant the discovery which, I agree in thinking, he could not have obtained in the action for penalties under the statute.

With the greatest desire, in an ordinary case, to relieve a party or a solicitor from the consequences of a slip in pleading or practice, I do not think that we ought, in this case, to reverse the exercise of discretion of the learned Judge, and, under these circumstances, to reinstate a cause of action which, at the time of making the application, was already gone.

Appeal dismissed with costs.

BRITTON, J.:—I agree.

\*142. Notwithstanding anything in the Criminal Code, 1892, every prosecution for an indictable offence under this Act, and every action, suit or proceeding for any pecuniary penalty given by this Act to the person suing therefor, shall be commenced within the space of one year next after the act committed, and not afterwards (unless the prosecution is prevented by the withdrawal or absconding of the defendant out of the jurisdiction of the court), and when commenced shall be proceeded with and carried on without wilful delay.

## [DIVISIONAL COURT.]

## REX V. COLE.

1901

April 16.

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Feb. 12.

*Criminal Law—Attempt to Incite—Perjury—Bail—Recognizance—Criminal Code, secs. 530 and 601—Estreat.*

A defendant charged with offering money to a person to swear that certain other persons gave him a sum of money to vote for a candidate at an election, was admitted to bail, the recognizance being taken before one justice of the peace:—

*Held*, that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to give false evidence or particular evidence, regardless of its truth or falsehood, and was a misdemeanour at common law, and that the recognizance was properly taken before one justice, who had power to admit the accused to bail at common law, and that section 601 of the Code did not apply.

The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law.

THIS was a motion to make absolute a rule *nisi* calling upon the Attorney-Général of the Province of Ontario to shew cause why the estreat roll upon the recognizance of bail entered into by Oliver Cole and A. F. Bowman, and the writ of *feri facias* and *capias* thereupon issued, and all proceedings to estreat the said recognizance or enforcing against the said bail, the estreating thereof should not be set aside, and all proceedings thereon stayed, upon the ground that the said recognizance of bail was accepted by one justice of the peace contrary to the provisions of section 601 of the Criminal Code, and that the recognizance was therefore invalid and could not be estreated.

The recognizance recited that "the said Oliver Cole did . . . offer the sum of two hundred dollars each to Samuel and Sylvester Cole if they would swear that George Smith or . . . or either of them gave them the sum of five dollars to vote . . .," etc.

Oliver Cole was admitted to bail by one justice of the peace to appear and answer, etc. He did not appear after the bill was found.

At the assizes held at Walkerton on 15th April, 1901, before ROBERTSON, J.

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*R. N. Ball*, for the Crown, moved to estreat the recognizance of A. F. Bowman, who, with the accused, had entered into a bond for the due appearance of the accused to answer the charge, etc.

*J. F. Palmer*, for Bowman, objected, and contended that the defendant being liable to be sentenced to imprisonment for more than five years, the recognizance was void, as it was taken before one justice of the peace only, contrary to the first part of section 601 of the Code.

*Ball*, in reply, contended that the crime charged was not perjury or subornation of perjury, but an unlawful attempt to incite, procure, counsel and induce the person named to commit perjury, and that the person accused was not liable to be imprisoned for more than five years, but for a term less than five years, viz., one year under section 530 of the Code for inciting, etc., there being no provision for inciting to take a false oath in the case set out in the charge.

April 16. ROBERTSON, J.:—The defendant was charged in the indictment found by the grand jury for that he “did unlawfully attempt to incite, procure, counsel and induce one Sylvester Cole unlawfully, willingly, knowingly, and corruptly to commit the crime of perjury,” etc.

I have considered this matter, and am of opinion that the contention of the counsel for the Crown is right.

The charge is not under sections 120 nor 121, nor is it under sections 146, 147, 148 to and inclusive of section 152 as to perjury, but comes under section 530, and an accused is liable to one year’s imprisonment who “incites or attempts to incite” any person to commit an offence under any statute for the time being in force and not inconsistent with the Code.

In this case there was only an attempt to incite the person named in the indictment to commit perjury. The crime of perjury was not committed, *i.e.*, the person on whom the attempt was made was not induced to commit perjury.

I think, therefore, the case comes clearly under section 530, and if the accused should be convicted he could not be imprisoned for more than a year. In my judgment, therefore,



Mr. Palmer's objection fails, and I must order the recognizance to be estreated.

Order made accordingly.

The rule *nisi* was moved absolute on December 3rd, 1901, before a Divisional Court composed of BOYD, C., and FERGUSON, J.

*Ritchie*, K.C., for the motion. The practice in cases like this is settled in *Re Talbot's Bail* (1892), 23 O.R. 65. This case does not come under section 530 of the Code. The words "in force and not inconsistent with this Act," clearly exclude the Code where the offence is provided for in the Code. Inciting to commit perjury is an attempt to commit the crime of subornation of perjury, and the recognizance should have been taken "jointly with some other justice." The punishment under section 146 is fourteen years; under section 528 is seven years. The accused may be punished if he counsels: sec. 61, sub-sec. (d); if he attempts: secs. 64 and 711; Taschereau's Criminal Code, 3rd ed., p. 96. This is an offence at common law: Archbold's Criminal Pleading, 22nd ed., pp. 3, 1019. At common law there was no limit to the term of imprisonment the Judge might impose; so that the accused, if found guilty of the charge, as an offence at common law, might have been imprisoned for more than five years. The offence charged is also covered by the Code, and under that more than five years' imprisonment might have been imposed.

*John R. Cartwright*, K.C., Deputy Attorney-General, *contra*. Even if this case came under section 601 of the Code, there is no authority that that would make the recognizance bad—the magistrate might be punished, but the recognizance would be good. Apart from the Code, the magistrate would have authority to admit to bail, and this case can be treated apart from the Code, as it is an offence at common law: 1 Russell on Crimes, 6th ed., p. 293; the punishment being fine and the pillory: 1 Hawkins' Pleas of the Crown, 8th ed., p. 437. Taschereau's Criminal Code, p. 96. The Code does not supersede the common law: *The King v. Carlile* (1819), 3 B. & Ald. 161. The offence here is "incitement" not "attempt:" Arch-

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bold's Criminal Pleading, 22nd ed., p. 1019. As to the powers of magistrates, see 2 Hawkins' Pleas of the Crown, p. 157, section 54.

*Ritchie*, in reply.

February 12. BOYD, C.:—To counsel and procure a person to commit an offence constitutes the counsellor or inciter a party to the offence, when *it is committed*. And by our Code he can be proceeded against as a principal: Code, sec. 61 (*d*); *The Queen v. Gregory* (1867), L.R. 1 C.C.R. 79, and *Benford v. Sims*, [1898] 2 Q.B. 641.

Subornation of perjury is counselling or procuring a person to commit any perjury which is actually committed: Code, sec. 145 (4).

In this case no evidence was given under oath, and no perjury was committed, and apart from the Code, the proper course in the case would be to indict as at common law for the misdemeanour of *inciting* to commit a felony (perjury). As put by Grose, J., in *The King v. Higgins* (1801), 2 East 5: "The incitement, . . . is the offence, though differing in its consequences, according as the offence solicited . . . is committed or not:" p. 18.

This motion is made upon what is disclosed in the information, evidence before the magistrate, the recognizance of bail, and the indictment found by the grand jury; the estreat roll and the writs of execution thereon.

But, for the purpose of determining the validity of the recognizance, on the objection made that it does not conform to the requirements of section 601 of the Code, we must, I think, regard only the contents of the record itself, as estreated.

The magistrate's warrant is not before us, but it is required to be set out as to substance in the recognizance, and no variance is alleged.

Now, the condition of the recognizance is thus expressed: "Now the condition of the said above written recognizance is such, that whereas the said Oliver Cole was this day charged before the justices above mentioned: for that he the said Oliver Cole did at Southampton, on the 7th day of January instant, offer the sum of two hundred dollars each to Samuel and

Sylvester Cole if they would swear that George Smith, C. R. Vanston or James Johns, or either of them, gave them the sum of five dollars to vote for Alex. McNeill at the last general election for the House of Commons of Canada.

"If, therefore, the said Oliver Cole will appear at the next court of competent jurisdiction to be holden in and for the county of Bruce, and there surrender himself into the custody of the keeper of the common gaol there, and plead to such indictment as may be found against him by the grand jury for and in respect to the charge aforesaid, and take his trial upon the same, and not depart the said court without leave, then the said recognizance to be void or else to stand in full force and virtue."

What is therein charged is the offering of money, in order that (presumably false) evidence should be given by the witness—though the falsity is not in terms stated—still, as it stands, it would appear to charge an offence in the nature of a misdemeanour.

Thus, in Archbold's Criminal Pleading, 22nd ed., p. 1019, it is laid down that "It is a misdemeanour to incite a witness to give particular evidence, when the inciter does not know whether it is true or false. . . . The offence differs from subornation in that it is not necessary to prove that the evidence was in fact given, or was actually false to the knowledge of the witness." To the same effect is the language of Holt, C.J., in *The Queen v. Darby* (1702), 7 Mod. at p. 101: "It seemed to be a common law offence, to offer money to swear to a particular thing whether true or false."

What is set out in the recognizance is not an attempt to commit the crime of subornation of perjury, as was argued, but something less, being an incitement to give false evidence or to give particular evidence, regardless of its truth or falsehood; that is a misdemeanour at common law, punishable by fine and infamous corporal punishment: 1 Russell on Crimes, 6th ed., p. 293.

In such a case, it is competent for a single justice of the peace to commit for trial and also to admit to bail as at common law. It is noted in 3 Viner's Abr. Title "Bail," (L.) 1, that one justice may bail a man for a misdemeanour to appear

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at the quarter sessions. And see generally as to this power of one justice of the peace in such cases : Petersdorff on the Law of Bail, pp. 479, 480, and particularly 488.

In this case the recognizance is good at common law : see *per* Holt, C.J., *The Queen v. Ewer* (1702), 7 Mod. 10.

This same ground as to the invalidity of the instrument was urged before Mr. Justice Robertson at the assizes by counsel for the surety, but it was overruled by him and the order issued that the recognizance should be estreated.

It may be that the same matter without appeal can be again raised in this Court after the estreat by virtue of sec. 14 of the Act, R.S.O. 1897, ch. 106, but as no objection was raised, the matter has been considered afresh upon the recognizance itself disembarassed from the indictment found.

It was urged that the indictment, as presented, disclosed the offence to be an attempt to commit subornation of perjury ; but the learned Judge held that it fell under section 530 of the Code, as being an attempt to incite a person to commit perjury, for which the penalty was one year's imprisonment.

In this view he is supported by the high authority of Mr. Justice Taschereau in his comment on the Code, 3rd ed., p. 96. I have not deemed it necessary to consider this aspect of the case, for it was competent for the grand jury to go beyond the charge contained in the magistrate's commitment, if founded upon the facts or evidence disclosed in the depositions : Code, section 641.

As to any such variance, the bail have no ground to complain ; for they are bound in a sum certain, and not to stand in the place of the principal : and his failure to appear is the cause of the forfeiture of the recognizance. See *The Queen v. Ridpath* (1714), 10 Mod. 152.

The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the latter law : *The King v. Carlile*, 3 B. & Ald. 161. But here the offence, as set forth in the recognizance, is not specified in the Code, and the power of the justice may be exercised as at common law in liberating the prisoner into the hands of bailsmen.



Rule *nisi* is discharged with costs.

FERGUSON, J., concurred.

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[IN CHAMBERS.]

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V.

THE LANCASHIRE FIRE INSURANCE CO.

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Feb. 24.

*Writ of Summons—Service on Insurance Company—Power of Attorney—Removal of Office from Province.*

An English insurance company which had carried on business in Canada and whose head office was then at Toronto, had by two powers of attorney appointed its general agent at Toronto attorney to receive process both under R.S.O. 1897, ch. 293, sec. 66, and R.S.C. 1886, ch. 124, sec. 13. It afterwards transferred its Canadian business to another company and closed its Canadian offices, but the deposit under the Dominion Act had not been released, and neither of the powers of attorney had been cancelled.

On a motion to set aside the service of a writ of summons which was accepted by solicitors as if served on the Toronto agent of the company, subject to the right to move against it on the ground that the company was not within the jurisdiction:—

*Held*, that a writ of summons upon a policy issued in Quebec in respect of a loss upon property there was properly served upon the agent named as attorney at Toronto under Con. Rule 159, and that therefore the Court in Ontario had jurisdiction to entertain the action.

*Semble*, that the power of attorney required to be filed under R.S.C. ch. 124, sec. 13, is to receive service of process in any suit instituted in any Province of Canada in respect of any liability incurred *in such Province*.

THIS was an appeal from a judgment of the Master in Chambers, dismissing a motion to set aside the service of a writ of summons on the defendant company, upon the ground that the company, at the time of such service, had no office in the Province of Ontario, and the policy sued on was issued in the Province of Quebec in respect of property in that Province.

The motion was heard on February 4th, 1902, before Mr. Winchester, the Master in Chambers.

*D. L. McCarthy*, for the motion.

*W. E. Middleton*, contra.

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February 12. THE MASTER IN CHAMBERS :—An application by the defendants for an order to set aside the service of the writ of summons herein upon the defendants, upon the ground that the defendants are not within the jurisdiction of this Court; or, in the alternative, for an order staying the proceedings herein, upon the ground that an action has been commenced by the plaintiffs against the defendants in the Province of Quebec in respect of the same cause of action as in this action; or, in the alternative, for an order allowing these defendants to enter a conditional appearance herein.

The action is one brought to recover for a loss under two policies of fire insurance upon three stores in Montreal in the Province of Quebec.

It appears from the evidence before me, that the policies in question were signed by the manager of the defendant company, at Toronto, and countersigned by the agent of the defendant company, at Montreal. The policies were issued in favour of the plaintiffs, who reside at Toronto, but it is not stated where the damage and loss which the assured might suffer by fire should be paid. The capital stock and funds of the company are, however, made liable by the policies for the payment of such loss.

For the defendant company, it is stated, that at the time of issuing of the policies in question, the head office of the defendant company was at Toronto; but shortly after the issue of the same, the defendant company was absorbed and taken over by the Royal Insurance Company; and they no longer have an office for transacting business in Ontario; and that they did not at the time of the service of the writ of summons carry on business as an insurance company in Ontario; and that there are no assets of the defendant company in Ontario; and that the defendant company were served with a writ of summons issued from the Superior Court of Quebec, on behalf of the plaintiffs herein, on or about the 9th January, 1902, which action is for the same cause of action, as set out in the writ of summons herein.

The plaintiffs admit having issued a writ of summons against the defendants in the Province of Quebec for the same cause of action as that for which this action is brought; but state that

they were compelled to do so in order to prevent the statute from running against them ; and that they are desirous of having such action stayed, provided they are at liberty to proceed with this present one.

The writ of summons herein was served upon the solicitors of the defendant company, who accepted service, as if served upon the Toronto agent of the Lancashire Insurance Company in Canada, subject to their right to move against it.

The defendant company filed with the Clerk of Records and Writs at Osgoode Hall the power of attorney, dated 7th July, 1892, made by them in pursuance of the Ontario Insurance Act, 1892, appointing Mr. Thompson the attorney of the company, in the name and on behalf of the corporation, to receive service of process in all actions and proceedings against the corporation in Ontario, for any liabilities incurred by the corporation therein, such service on the said attorney to be binding on the company.

And by a power of attorney, dated 21st April, 1892, appointing Mr. J. G. Thompson, of Toronto, chief agent of the defendant company in Canada, the company declare that the agency, so to be established and maintained, shall be the head office of the said company in Canada ; and the said company authorized the said attorney to receive process in all suits and proceedings against the said company, in any Province in Canada, in respect of any liabilities, incurred by the said company therein, etc.; and declared that service of process, for or in respect of said liabilities, should be legal and binding on the company to all intents and purposes.

The power of attorney, dated 7th July, 1892, was filed pursuant to R.S.O. 1897, ch. 203, sec. 66, and that dated on the 21st April, 1892, was so filed, pursuant to R.S.C. 1886, ch. 124, sec. 15, and sec. 16 provides that: "After such power of attorney and certified copies are filed as aforesaid, any process in any suit or proceeding against any such company, in respect of any liabilities incurred in any Province of Canada, may be validly served on the company at its chief agency ; and such service shall be deemed to be service on the company."

It seems to me, that the plaintiffs herein have complied with the requirements of the statute, in serving the chief agent of the

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company in Canada. If the contention of the defendant company be correct, that there is no agency in Canada, the service in Quebec will not avail the plaintiffs, and they may very well desire to discontinue the action brought there and proceed with the present one.

In the detailed report of the Inspector of Insurance for Ontario for the year 1901, respecting the defendant company, he reports as follows:—

“1. Head office, Manchester, England; chief agent and attorney for Ontario, James G. Thompson, Toronto. Suits by or against the company may be brought in the name of the Lancashire Insurance Company. . . .

“5. Deposited assets. Assets of the company are deposited and held in Canada, as special security for the policy holders therein, as follows: Deposit accepted at the value of \$228,833, held by the Receiver-General of the Dominion Government at Ottawa.”

This official publication is made evidence by R.S.O. 1897, ch. 203, sec. 74 (3).

I am therefore of the opinion, that service herein was properly made under Rule 159,\* and that the writ was one that could be served in Ontario, or even one, that could be issued in Ontario for service out of the jurisdiction under Rule 162 (h).†

\* 159. When a corporation is a party to a cause or matter,

(a) A writ of summons or other document by which the cause or matter is commenced, and,

(b) In the absence of the appearance of the corporation by solicitor, all papers and proceedings in the cause or matter before the final judgment, or order therein,

May be served on the Mayor, Warden, Reeve, President, or other head officer, or on the Township, Town, City or County Clerk, or on the Cashier, Treasurer or Secretary, Clerk or Agent of such corporation, or of any branch or agency thereof in Ontario; and every person who, within Ontario, transacts or carries on any of the business of, or any business for, any corporation whose chief place of business is without Ontario, shall, for the purpose of being served as aforesaid, be deemed the agent thereof.

† 162. (1) Service out of Ontario of a writ or notice of a writ may be allowed by the Court or Judge wherever: . . . .

(h) Service may also be allowed where the action is for any other matter and it appears to the satisfaction of the Court or a Judge that the plaintiff has a good cause of action against the defendant upon a contract or judgment, and that the defendant has assets in Ontario of the value of \$200 at least, which



The motion to set aside the service will be refused. The proceedings in Quebec Province will be, at the request of plaintiffs, stayed until further order, and the defendants will be given liberty to enter a conditional appearance. Costs in the cause.

Subsequently, on February 20, the Master added the following to his judgment:—In settling the order made by me herein on the 13th inst., counsel for the plaintiff asks that the clause allowing the entering of a conditional appearance be struck out, on the ground that the defendants' application to set aside the service of the writ has been disposed of on the merits, and that the defendants should not again have the right to object to the plaintiff's right to bring the action in this Court.

I think the contention is a fair one and should be allowed.

I do this the more readily, as the defendants are appealing from the order made by me, and this point had better be considered on such appeal at the same time as the other question that is in dispute.

From this judgment the defendants appealed, and the appeal was heard in Chambers, on the 24th February, 1902, before STREET, J.

*D. L. McCarthy*, for the appeal.

*W. E. Middleton*, contra.

At the close of the argument,

STREET, J. :—I think that according to the true construction of sec. 13 of The Insurance Act, R.S.C. 1886, ch. 124, the power of attorney which is thereby required to be filed is one authorizing the attorney to receive service of process in all suits and proceedings against the company in any Province of Canada, in respect of any liability incurred by the company in

may be rendered liable for the satisfaction of the judgment, in case the plaintiff should recover judgment in the action ; but in such case if the defendant does not appear, the Court or a Judge shall give directions from time to time as to the manner and conditions of proceeding in the action, and shall require the plaintiff, before obtaining judgment, to prove his claim, before a Judge or jury or in such manner as may seem proper.

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said Province, and, if the matter rested there, I should very much doubt the propriety of the order in appeal.

In this case, however, service has been admitted, as though served upon the agent of the company at Toronto, and I think the case, therefore, falls precisely within Consolidated Rule 159, and service was properly made upon the agent of the corporation, who carried on its business within Ontario.

The form of the order made by the learned Master is objectionable in ordering a stay of proceedings in an action pending in the Province of Quebec: he could only do this indirectly and not directly. The clause providing for the stay of proceedings in Quebec should be struck out, and counsel for the plaintiffs having offered in Court to discontinue the action in the Province of Quebec and pay the costs there incurred, upon an unconditional appearance being entered by the defendants in the suit, the order will so provide.

The costs of the application will be to the plaintiff in any event.

G. A. B.

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[IN CHAMBERS.]

RE EVANS.

1902

Feb. 7.

*Will — Provision in Case of Sickness — Executors' Discretionary Power — Personal Representatives.*

A testatrix by her will bequeathed a sum of money to her son, with a direction that her executors should invest the same and pay to him half the interest, and in case of his sickness to advance to him such portion of the principal money as they should think necessary, and in case of his death, after paying the funeral and other necessary expenses to divide the amount equally amongst her other surviving children; and by a residuary clause, she gave the residue of her estate to her children in equal shares :—

*Held*, that in case of sickness a trust was created, which must be exercised by the executors, when called upon to do so, though they had a discretionary power to determine the amount necessary to be so applied, and that such sum was payable to the son's personal representatives.

The son was taken ill and died :—

*Held*, that the trust arose, and the circumstance that the beneficiary died before the money was actually advanced or set apart did not operate to deprive his personal representatives of the right to receive it.

*Held*, also, that the son's creditors had no direct claim against the executors or the fund.

THIS was an originating notice under Con. Rule 938 given by William Selby and Walter Scott Rogers, the executors and trustees under the last will and testament of Margaret Evans deceased, for the construction of the said will.

The will was dated the 31st January, 1879. Margaret Evans died on the 3rd day of May, 1883, and probate thereof was issued on the 10th May, 1883, to the executors appointed thereunder.

The only clauses of the will material were the sixth, and the clause dealing with the residue.

The sixth clause was: "I give and bequeath to my sons Grier Evans and William James Evans the sum of \$300 each; but I direct my said executors to invest the same in good security during the lifetime of my said sons, or the survivor of them, and to pay to each of them one-half of the interest arising from such investment; and in case of sickness of my said sons, or either of them, I desire my said executors to advance such portion, as they may think necessary, of the principal money to support my said sons, or such of them as may be sick; and in case of the death of one of my said sons, his legacy, after paying his funeral and other necessary expenses, to be divided equally amongst my surviving children, with the

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exception of my surviving son's share, which I direct my said executors to invest, and pay the interest yearly during his lifetime."

The residuary clause was: "And as to the rest, residue and remainder of my estate and effects, of every nature and kind, and wheresoever situated, I give, devise and bequeath the same to my said children in equal shares."

The executors, pursuant to the directions of the will, duly received and invested the sum of \$300, so given and bequeathed to Grier Evans, and paid the annual interest arising therefrom to him down to the time of his death, which occurred on the 23rd June, 1901, and since his death they had paid out of the said sum of \$300 the sum of \$42.25 for a grave lot, funeral, and testamentary expenses incidental thereto, leaving in their hands \$257.75.

On the 12th November, 1901, an action was brought against the executors by one Alexander Wright, claiming the sum of \$200 as due to him for board and lodging furnished the said Grier Evans from April, 1900, to 23rd June, 1901, and for labour performed and expenses incurred by reason of his death, and claiming a declaration that the said sum in the executors' hands was liable for the payment of his claim.

There were also other creditors of Grier Evans.

Grier Evans died unmarried and without issue, and the only surviving children of Margaret Evans were two sisters, Mary Ann Burns and Jane Harper, and his brother William James Evans, who were adults over the age of twenty-one years.

It was contended by the surviving children that, apart from the funeral and expenses incidental thereto, so paid by the executors, the amount in the executors' hands was not liable for the payment of Alexander Wright's claim, or any other claim, or debt, against Grier Evans.

The executors prayed that the rights of the several claimants to the said fund might be determined, and that it might be declared who, on a proper construction of the will, was entitled to the fund in question; or, in the alternative, that the executors might be allowed to pay the same into Court, and upon such being made they should be relieved from all liability in respect thereof.



They also asked that their compensation might be determined, and their accounts passed and audited; that they should be paid the costs of this application; that all further proceedings in the action of Alexander Wright should be stayed; and that they should be allowed, as between solicitor and client, their proper costs, so far incurred, including the costs of defending the said action.

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On January 13th the application came on before Moss, J.A., sitting in Chambers for Britton, J.

*James Bicknell*, for the executors.

*R. U. McPherson*, for the brother and sisters.

*H. G. Tucker*, for Alexander Wright.

February 7. Moss, J.A.:—With regard to the interests of the parties in the sum of \$300 held by the applicants under the will of Margaret Evans, five questions are propounded by the originating notice, but it does not seem necessary to answer them all in terms. It appears to me that an answer to the fourth question will cover all that is sought by the others.

The testatrix did not very clearly express her intention with regard to the exact nature of the interest to be taken by her two sons, Grier Evans and William James Evans, in the moneys bequeathed to them, and it is somewhat difficult to get at her precise meaning.

Mr. Tucker conceded, and I think rightly, that it is not an absolute gift of the corpus; but he argued, and I think rightly, that it is more than a gift of a life interest in the income. The direction to the executors that in case of sickness of the sons, or either of them, they are to advance out of the principal such portion as they may think necessary for the support of the one who is sick, gives an interest in the corpus. It creates a trust to be exercised by the executors in case of sickness, and they have no discretion to decline to exercise it if called upon to do so.

They are at liberty to use their discretion in determining the amount necessary to be applied for the support of the sick son, and in that respect they would not, in ordinary circumstances, be controlled by the Court.

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I think the effect of these directions of the will is, that upon a son falling sick a right to some portion of the principal of his legacy vests in him, the amount being that which the executors may, in their discretion, think necessary for his support during his sickness, and that in the event of his death before receiving that amount his estate is entitled to receive it from the executors.

It appears to be the case that the executors had no knowledge of Grier Evans's sickness, and were not called upon for an advance while he was alive, but, if I am correct in my reading of the will, and the fact of sickness is all that is needed to vest the right to some amount and to give rise to the duty of advancing it, the circumstance that the beneficiary died before it was actually advanced or set apart, should not operate to deprive his personal representative of the right to receive it.

The language of Vice-Chancellor Sir Page Wood in *In re Sanderson's Trusts* (1857), 3 K. & J. 497, at p. 507, seems applicable, although the circumstances were not the same.

He said: "The trustees have not the discretion of saying 'We will withhold any part of this income merely upon our representations of what we think discreet.' If a bill had been filed on behalf of this gentleman during his lifetime to have a sufficient part of the income drawn out for the purposes of his maintenance, attendance and comfort, it would not have been competent for the trustees to say 'We in our judgment, and in the exercise of our discretion, do not think that is requisite, and the matter is one for our discretion and not for the judgment of the Court.' The testator might have given them such a discretion, regard being had to the circumstance that his brother had other property; but that is not the trust he has created. The trust he has created is an absolute trust for his brother to have everything necessary for his maintenance, attendance and comfort."

And see *Kilvington v. Gray* (1839), 10 Sim. 293.

Here a case of sickness being made out, I think the trust which was created in anticipation of that contingency arose, and the executors may still exercise their judgment and discretion as to the amount necessary to be advanced to answer

what was required for support in the sickness, or if they are not now disposed to exercise this power, the Court may undertake it.

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This does not give the creditors of Grier Evans any direct claim against the executors or the fund. In strictness the claim should be maintained by the personal representative of Grier Evans, and unless the parties can now agree (all being adults) it may be necessary to appoint a personal representative.

If the executors are prepared to declare what sum should be advanced, and the other parties are willing to dispense with a personal representative, and to agree to a proper distribution of the sum amongst the claimants against Grier Evans' estate, the Clerk in Chambers may make the necessary enquiries as to the claimants and apportion the amount, and the executors may hold the residue to be dealt with as provided by the will.

In that event they and the parties interested in the residue may receive their costs out of the fund.

I do not think I can at present order a stay of the action brought by Alexander Wright in the county court of Grey, but if he chooses to discontinue it and to come in and take the benefit of the order in this proceeding, he may have his costs of this proceeding. On the subject of costs, I observe that there is not only an originating motion but a petition by the executors, which seems entirely unnecessary.

At present I dispose of the matter by declaring, in answer to the 4th question, that the executors hold the sum of \$300 in question subject to the right of the personal representative of Grier Evans to receive thereout such sum as may be deemed necessary as an advance for the support of Grier Evans in his sickness, and subject thereto, and to the payment of his funeral and other necessary expenses, for the persons named in the will as entitled in remainder.

In case of any question arising on settling the order, the matter may be spoken to before me at any time.

G. F. H.

## [IN CHAMBERS.]

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Jan. 27.

*Revenue—Succession Duty—Legacy—Payment of Legacy Within a Year—Set-off.*

A direction in a will to executors to pay debts, funeral and testamentary expenses does not operate so as to make succession duty payable under R.S.O. 1897, ch. 24, a charge on the residue and to exonerate the legacies from payment thereof.

*Manning v. Robinson* (1898), 29 O.R. 483, followed.

The rule that executors are not bound to pay pecuniary legacies before the expiration of a year from the testator's death does not prevent them, where no time is fixed for payment, and there is sufficient to pay debts, legacies and charges, from paying a legacy forthwith, and in this case they were held entitled to allow the amount of a legacy to be set off against a mortgage due by the legatee to the estate, the mortgage giving the privilege of payment wholly or partially at any time.

THIS was an application by the executors, under Con. Rule 938, for the construction of the will and codicil of Ichabod Holland of the township of Brighton.

The will was dated the 22nd April, 1899, and the codicil the 6th December, 1900.

The testator died on the 4th day of February, 1901, and probate was issued on the 27th March, 1901, to Alice Holland, his widow, executrix, and to Willet C. Dorland and Ichabod Palen, the executors named in the will.

The testator by his will directed that "All my just debts, funeral and testamentary expenses shall by my executors hereinafter named be paid out of my estate, as soon after my decease as shall by them be found convenient;" and that a suitable stone to mark his place of burial be placed at the head of his grave.

He gave his wife all the household furniture and chattel property, to be hers forever, or to be disposed of as she saw fit. He also gave her \$2,000 in money, and the use, improvement and income of his dwelling house and lands, and the appurtenances during the term of her natural life, to be in lieu of dower.

He devised certain other lands to Willet C. Dorland, his heirs and assigns forever; and made the following bequests:—To William Purvis, son of his sister, Maria Purvis, \$200; to Nellie Purvis, the daughter of his said sister, Maria Purvis,



\$200; to May Irene Harrington, daughter of Anderson and Addie Palmer, \$1,000.

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He also devised certain other lands to his nephew, Ichabod Palen, and to his mother, Aramanda Palen, their heirs and assigns forever.

He then directed that "All the money accruing from notes and mortgages, and all other sources, shall be placed, with what money I may have, in the bank, at the time of my decease; and the heirs shall be paid off in the order in which they are mentioned. The balance of the money is to be kept in the bank until my wife's decease, when I direct that the south half of lot No. 28 in the 6th concession of the township of Brighton shall be sold, and the proceeds, with what is in the bank, shall be equally divided among the following, or those of them who shall then be living: Willet C. Dorland, Ichabod Palen (both hereinbefore mentioned), Joseph Purvis, my sister, Maria Purvis' son and Hiram Brock, my sister, Pamela Brock's son"; and he nominated and appointed his said wife, Alice Holland, Willet C. Dorland and Wesley Montgomery as his executors.

By a codicil to his will, dated December 6th, 1900, the testator appointed Ichabod Palen executor in the place of Wesley Montgomery.

William Purvis predeceased the said testator.

At the time of the testator's death the husband of May Irene Harrington was indebted to the estate in the sum of \$1,600, which was secured by mortgage on certain lands, the amount repayable in yearly instalments; and she desired the executors to credit the amount of her legacy on the mortgage.

The following questions were submitted for the opinion of the Court:—

1. Whether the succession duty payable in respect of the estate should be charged against the respective shares of the devisees and legatees, or should the same be payable out of the residue of the estate?

2. Whether the pecuniary legacies, or any of them, bore interest from the testator's death, or if not, from what date?

2 (a). Whether — Mrs. Harrington having notified the executors of her desire to have her legacy of \$1,000 credited

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upon the mortgage held by the estate against her and her husband—interest should not stop *pro tanto* from the date of the said notice?

3. Whether the legacy bequeathed to William Purvis made in the said will, who predeceased the testator, has lapsed?

The motion came on for argument before Moss, J.A., sitting for Britton, J., in Chambers, on the 13th January, 1902.

Clute, K.C., for the executors.

R. U. McPherson, for the residuary legatees.

January 27. Moss, J.A.:—As to the first question, I answer that the succession duty is not payable out of the residue.

Mr. Clute argued that the direction to the executors to pay testamentary expenses operated to charge the succession duties upon the estate and exonerated the legacies; and in support of this he relied upon some recent decisions in the English Courts.

But in *Manning v. Robinson* (1898), 29 O.R. 483, the will under consideration gave to the executors and trustees all the testator's real and personal estate (except a portion specifically bequeathed) and directed that they should stand possessed of the proceeds on trust "to pay my just debts, funeral and testamentary expenses," and the legacies and bequests therein set forth. It was held that the succession duties were not payable out of the residue.

Armour, C.J., said, "The legacy duty payable to the Government is properly deducted from the legatees and should not be paid out of the residue, and the plaintiffs have no discretion to pay such duty out of the residue."

I am unable to see any real distinction between that case and the present, and I make the same answer as the learned Chief Justice made in the case before him.

Question No. 2 is, "Whether the pecuniary legacies or any of them bear interest from the testator's death, or if not, from what date?"

The discussion before me was chiefly with reference to the case of Mrs. Harrington, to whom the testator bequeathed a legacy of \$1,000. At the date of the testator's death Mrs.

Harrington was indebted to him under a mortgage securing \$1,600 payable in yearly instalments of principal with interest on unpaid principal. The mortgage gives Mrs. Harrington the privilege of paying the whole or any portion of the principal at any time. It is stated that shortly after the testator's death Mrs. Harrington requested the executors to credit her legacy upon the mortgage.

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I do not find in the terms of the will or in these circumstances any reason for saying that the executors were bound to pay the pecuniary legacies or any of them before the expiration of a year from the testator's death. The second question must, therefore, be answered in the negative.

After the argument the originating notice was by consent amended so as to present the following further question :

" 2 (a). And Mrs. Harrington having notified the executors of her desire to have her legacy of \$1,000 credited upon the mortgage held by the estate against her and her husband, whether interest on the said mortgage should not stop *pro tanto* from the date of said notice."

I gathered during the discussion that the desire of the parties was to obtain the opinion of the Court as to whether it was within the power of the executors to treat the legacy to Mrs. Harrington as payable at once, and give credit therefor upon the mortgage and so stop interest.

Where no time is fixed for payment of a legacy the executors are not bound to withhold payment until the expiration of a year. If it is clear that the fund for the payment of debts, legacies and charges is sufficient they may, if they choose, pay legacies within the year : Williams on Executors, 9th ed., 1240. And as Mrs. Harrington is entitled to pay off any portion of the principal money of her mortgage at any time there was nothing to prevent the executors, if satisfied of the sufficiency of the funds in their hands to answer other purposes, from exercising their discretion in favour of paying her legacy by crediting it against her mortgage before the expiration of a year from the testator's death. Save as above I do not answer this question.

I answer question No. 3 in the affirmative.

The costs will be out of the estate.

G. F. H.

## [DIVISIONAL COURT.]

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REX EX REL. ROBERTS V PONSFORD ET AL.

Feb. 26.  
March 6.  
March 19.  
April 19.

*Municipal Elections—Quo Warranto—Notice of Motion—Time—Wrong Day of Week—Mistake—Amendment.*

A notice of motion in the nature of a quo warranto to contest the validity of the election of the respondents as aldermen of a city, was, by fiat of the Master in Chambers under sec. 220 of the Municipal Act, R.S.O. 1897 ch. 223, allowed to be served upon the respondents, and was served on the 15th February (seven clear days' notice being required by sec. 221) for "Tuesday the 24th day of February" the 24th February being, in fact, a Monday. Afterwards, the relator served upon the respondents a notice to the effect that the day on which the motion would be made was Tuesday the 25th February, but this notice was not a seven clear days' notice:—

*Held*, that the notice of motion was good and sufficient notice for Tuesday the 25th February, and that the sureties upon the relator's recognizance, as required by sec. 220, would have no ground of objection because of the proceedings not being properly prosecuted.

*Eldon v. Haig* (1819), 1 Chit. 11, followed.

*Semble*, that the practice in actions in the High Court is applicable to these quo warranto proceedings.

SUMMARY application for an order voiding the election of the respondents as aldermen of the city of St. Thomas.

On the 6th February, 1902, the relator obtained a fiat for leave to serve notice of the application upon the respondents. In the notice the relator's solicitor filled in the date of return as "Tuesday the 24th day of February, A.D. 1902"—the 24th day of February being a Monday—and the notice so drawn was served upon the respondents on the 15th February, 1902. By sec. 221 (1) of the Municipal Act, R.S.O. 1897, ch. 223, seven clear days' notice is required. On the 18th, 20th, 21st, and 22nd February, 1902, the respondents, respectively, were served with a notice to the effect that the day on which the motion would be made was Tuesday the 25th February.

The motion came before Mr. Winchester, the Master in Chambers, on the 25th February.

*E. E. A. DuVernet*, for the respondents, objected that the notice of motion for which the fiat had issued had lapsed, inasmuch as it was returnable on Tuesday the 24th February, 1902, and before its return a notice had been served changing



the date to Tuesday the 25th February, 1902; and asked costs against the relator of the abandoned motion of the 24th February.

*J. H. Moss*, for the relator.

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February 26. THE MASTER IN CHAMBERS:—It had escaped my memory at the time of the argument that Mr. McEvoy, the solicitor of the relator, had appeared in my room on the morning of the 24th February, at or shortly after 11 o'clock, and before I had gone into Chambers, and stated that the original notice of motion had given the day of its return as "Tuesday the 24th day of February," instead of the 25th, and that he had given notice correcting the mistake, and that he did not expect any one to appear, and that he thought it unnecessary for him to wait in Chambers, and wished the matter to be explained if any one appeared for the respondents. No one appeared for the respondents during the holding of Chambers. I dismissed the matter from my mind; but the facts as stated above have since recurred to me; and, if Mr. DuVernet wishes still to argue, notwithstanding the above statement, that the recognizance is not good, I shall be pleased to hear argument; but, if not, then the order will issue to examine witnesses, the examiner being agreed on.

Further argument was heard on the 29th February, 1902, the same counsel appearing.

March 6. THE MASTER IN CHAMBERS:—This is an application for an order to unseat the respondents, who have been elected aldermen of the city of St. Thomas.

On the 6th February, 1902, the relator, upon filing his affidavit and the affidavit of two others, etc., obtained a fiat from me to serve the notice of motion—upon his filing a sufficient recognizance, as provided by the Municipal Act, R.S.O. 1897, ch. 223, sec. 220 \*—for an order setting aside and

\* 220.—(1) In case within six weeks after an election, or one month after acceptance of office by the person elected, the relator shews by affidavit . . . reasonable ground for supposing that the election was not legal . . . or for contesting the validity of the election of any mayor . . . alderman . . . the Judge shall grant his fiat, authorizing the relator, upon entering into a

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declaring invalid and void the election or pretended election held on the 6th January, 1902, at the city of St. Thomas, under which election the respondents—11 in all—had unjustly usurped the office of aldermen in and for the city of St. Thomas. Before serving the notice of motion, the relator's solicitor filled in the date upon which it was returnable as "Tuesday the 24th day of February, A.D. 1902." This notice of motion was served upon the respondents on the 15th February, 1902, and shortly thereafter it was discovered that a mistake had been made in describing the date as "Tuesday the 24th day of February," instead of "Tuesday the 25th day of February;" and, on the 18th February, a notice, intituled in this matter, and reading as follows: "Take notice that, by a clerical error in the notice of motion served on you herein, it is stated that a motion will be made before the said Master in Chambers, at Osgoode Hall, in the city of Toronto, at 11 o'clock in the forenoon, on Tuesday the 24th day of February, 1902, instead of Tuesday the 25th day of February, 1902, and you are hereby notified that the day on which the said motion will be made is Tuesday the 25th day of February, A.D. 1902:" was served upon a number of the respondents by the relator; and the remainder were served with the same on the 20th, 21st, and 22nd days of February. This notice was signed by the relator, John West Roberts, by his solicitor.

On the 24th February, 1902, the solicitor for the relator appeared in my room, just previous to my entering into Chambers at or shortly after 11 o'clock, and stated that the original notice of motion had given the day of its return as Tuesday the 24th February, instead of the 25th, and that he had given a notice correcting the mistake, and that he did not expect any one to appear that morning—the 24th—and that he thought it unnecessary for him to wait in Chambers, and

sufficient recognizance as hereinafter provided, to serve a notice of motion in the nature of a *quo warranto* to determine the matter.

(2) The recognizance shall be entered into . . . by the relator in the sum of \$200, and by two sureties . . . each in the sum of \$100; and the recognizance shall be conditioned to prosecute the motion with effect, and to pay to the party against whom the motion is made any costs which may be adjudged to him against the relator.

wished the matter to be explained if any one appeared for the respondents. No one mentioned the matter to me in Chambers on behalf of the respondents, although I afterwards discovered that a gentleman was present on behalf of the respondents to watch the proceeding, but not to proceed with the argument of the matter.

On Tuesday the 25th February counsel for both relator and respondent appeared before me, and the latter objected to further proceeding in the matter, on the ground that the motion had been abandoned, and asked for costs of an abandoned motion, and further contended that the second notice served was so served without any authority, and that the sureties were, under the circumstances, released, or, in case they were ordered to pay the costs of these proceedings, could plead this irregularity in relief.

A number of cases were cited by counsel for the respondents in support of his contention, one being the old case of *Batten v. Harrison* (1802), 3 B. & P. 1, where the notice was made returnable on "Tuesday the 14th January instant," instead of "Thursday the 14th January instant," and the Court held it to be a good notice for the 14th January, regarding the word "Tuesday" as surplusage. This, counsel contended, supported the notice of motion herein as being good for the 24th February, and that the notice making it the 25th February was improper, and the motion not having been made on the 24th February, it must be considered as having been abandoned.

The case of *Eldon v. Haig* (1819), 1 Chit. 11, held that a similar notice to that referred to in *Batten v. Harrison*, made returnable on Wednesday the 11th June instant, when Wednesday fell on the 10th June, on which day the writ of inquiry was executed, was sufficient, and the Court refused to set aside the execution of the writ of inquiry, the defendant not swearing that he was thereby misled.

The judgment of Abbott, C.J., is as follows: "The mistake in this notice is apparent upon the face of it. The day of the week is rightly mentioned, but there is a mistake in the day of the month. It was the defendant's duty, under such circumstances, to have sent to the plaintiff to know whether he meant *Wednesday*, without reference to the day of the month,

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inasmuch as he was entitled to his notice for the *Wednesday*. Any reasonable man must have understood what was intended

Bayley, J., said: "In the case of *Batten v. Harrison*, 3 B. & P. 1, the Court supported the notice, and I think they did very right, because there the day of the month and not the day of the week, was the material thing to attend to. Here the day of the week is the material point, and that day is expressed. If there was any mistake apparent upon the face of the notice, the defendant should have asked, 'Do you mean one day, or the other?' It is not suggested in the affidavit that the defendant was deceived; and as we think he was not, there is no pretence for this motion."

Holroyd, J., said: ". . . It is suggested that the notice was served on the 2nd, and therefore it would have been good for the 10th, but not for the 11th of June; but that will not help the defendant, for if there had been any mistake in the notice, it ought to have alarmed his suspicions, and induced him to ask of the plaintiff, which day was intended. He does not pretend that he was misled, and we cannot presume that he was."

It was further argued by counsel for the respondents that there was no provision in the statute giving any authority to amend the notice of motion or enlarge the time. R.S.O. 1897, ch. 223, sec. 220 (4), seems to me, however, to give all the power that is given by the Con. Rules of Practice under the Judicature Act, in the proceedings under that Act. It says: "Where the proceedings are taken before a Judge of the High Court or before the Master in Chambers . . . the same shall be entitled and conducted in the High Court of Justice in the same manner as other proceedings in Chambers . . ."

From 1888 to 1897 the provisions of this statute, secs. 220 (1) and (2) to 236, inclusive, formed a portion of the Con. Rules of Practice under the Judicature Act, but they were in 1897 consolidated in the Municipal Act, with the addition of 220 (4) any one or two other sub-sections—thus indicating that the practice in High Court matters was intended to be still made applicable to such applications. Even before the sections relating to controverted municipal elections had been consolid-



ated in the Rules of Practice, it was held that the Rules of Practice applied. There are a number of cases shewing this.

In *Regina ex rel. Linton v. Jackson* (1851), 2 C.L. Ch. 18, and in *Regina ex rel. McManus v. Ferguson* (1865), 2 U.C.L.J. N.S. 19, it was held that proceedings in these *quo warranto* matters were not to be held irregular and void if they did not interfere with the just trial of the matter on the merits. See also *Regina ex rel. Grant v. Coleman* (1882), 7 A.R. 619, at p. 625.

I would also refer to cases of irregularity in giving notice of trial, where the statute requires a certain notice to be given, but where the irregularity was not allowed as sufficient to set aside the notice: see *Holmested & Langton*, p. 704.

I hold, therefore, that the notice of motion given herein, under the circumstances set forth, is good and sufficient notice for Tuesday the 25th February, 1902, and that the sureties can have no ground of objection because of the proceedings not being properly prosecuted.

The order for the examination of witnesses will issue; to be spoken to as to the examiner.

The respondents appealed from this decision, and their appeal was heard by ROBERTSON, J., in Chambers, on the 14th March, 1902.

*DuVernet*, for the appellant, referred to *Maullin v. Rogers* (1886), 34 W.R. 592; *Daubney v. Shuttleworth* (1876), 1 Ex. D. 53; *Biggar's Municipal Manual*, p. 238; *Regina v. Calloway* (1886), 3 Man. L.R. 297; *Am. & Eng. Ency. of Pleading and Practice*, vol. 7, pp. 390, 392; *Crane v. Crofoot* (1845), 1 How. Pr. (N.Y.) 191; *Reese v. United States* (1869), 9 Wall. 13; in addition to the cases discussed by the Master.

*Moss*, for the respondent, relied on the authorities cited by the Master.

March 19. ROBERTSON, J.:—I have considered this motion, and all the cases cited by Mr. DuVernet, and I have come to the conclusion that the matter disposed of by the Master in Chambers was clearly within his jurisdiction, and I fully concur in his judgment and in the reasons given by him, and dismiss the motion with costs.

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An appeal from this decision was argued by the same counsel before a Divisional Court [BOYD, C., FERGUSON and MEREDITH, JJ.,] on the 7th April, 1902.

April 19. BOYD, C.:—The Court is agreed that the judgment of Mr. Justice Robertson should be affirmed, and the appeal is dismissed with costs.

E. B. B.

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[BRITTON, J.]

1902  
 March 17.

TORONTO JUNCTION PUBLIC SCHOOL BOARD  
 v.  
 COUNTY OF YORK.

*Public Schools—Separated Town Within County—County Model School Situated in—Liability of County.*

The town of Toronto Junction, territorially within the limits of the county of York, but a separate town within the provisions of the Municipal Act, and as a municipality not under the jurisdiction of the county council, is yet part of the county, within the meaning of secs. 83 and 84 of the Public Schools Act, 1 Edw. VII. ch. 39 (O.); and the county is bound to contribute to the support of a county model school situated in the town.

AN action for a declaration that the defendants, the corporation of the county of York, were liable, under the provisions of the Public Schools Act, 1 Edw. VII. ch. 39 (O.), to contribute towards the support of the South York county model school situated at Toronto Junction.

The statement of claim alleged, *inter alia*, the following:—

1. Prior to the 15th June, 1889, a board of examiners was duly appointed by the county council of the county of York pursuant to and for the purposes indicated in the Public Schools Act.

2. Pursuant to that Act, on the 15th June, 1889, the said board of examiners duly set apart two public schools in the county as county model schools, to wit, the public school in Annette street, Toronto Junction (being one of the schools

under the control of the plaintiffs) as the South York model school, and the public school at Newmarket as the North York model school.

3. Pursuant to the Municipal Act, a by-law was duly passed by the municipal council of the town of Toronto Junction, on the 22nd July, 1890, withdrawing that town from the jurisdiction of the council of the county of York.

5. Since the 15th June, 1889, the schools at Toronto Junction and Newmarket have been county model schools for the professional training of third class teachers for the county of York, and the board of examiners for the county of York have each year distributed the teachers in training between the two schools, and have supervised their work, and conducted the qualifying examinations at the close of each term, and have issued certificates to those candidates in the said schools respectively who became entitled thereto, qualifying them to teach public schools within the county.

9. From the incorporation of the town of Toronto Junction until the enactment of 63 Vict. ch. 103 (O.) the town and school sections 13 and 22 of the township of York constituted a union section for school purposes under the control of the plaintiffs; by that statute the union was dissolved.

10. The council of the county of York always until the year 1901 recognized the South York model school as a county model school, and each year until 1901 contributed towards its support as such.

11. Prior to the commencement of this action, the plaintiffs applied to the defendants for payment of the annual grant for 1901 in respect of the school in question, pursuant to sec. 84 of the Public Schools Act, but the council refused to pay the same, and denied the liability of the defendants to contribute further towards the support of the school.

The defendants by their statement of defence alleged:

3. That the town of Toronto Junction is a separated town within the provisions of the Municipal Act, and is a municipality outside of the county of York, and is not under the jurisdiction of the council of the county of York for municipal, educational, or other purposes.

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4. The defendants are not bound, and have no power, to make the annual grant asked for in the statement of claim.

Sections 83 and 84 of the Public Schools Act are, so far as applicable to this case, as follows:—

83.—(1) The municipal council of each county shall appoint annually a board of examiners, consisting of the inspector or inspectors having jurisdiction within the county, including the inspector or inspectors of the county town or of any town separated from the county or any part thereof, and not more than two other persons holding first-class certificates of qualification, for the purpose of examining candidates for teachers' third class certificates and for such other purposes as are prescribed by this Act. . . . .

84.—(1) The board of examiners of every county may, subject to the regulations of the Education Department, set apart at least one public school in each county as a county model school for the training of teachers for third-class certificates.

(3) The municipal council of every county shall pay to the treasurer of each public school within the county to which a model school is attached an amount at least equal to the sum voted by the Legislative Assembly for each county model school, but the amount to be provided by the county council shall not be less than the sum of \$150 annually, and the council may, if it sees fit, provide a larger amount of aid.

The action was tried before BRITTON, J., without a jury, at Toronto, on the 14th March, 1902.

*W. E. Raney*, for the plaintiffs. By the Act respecting the Territorial Division of Ontario for Municipal and Judicial purposes, R.S.O. 1897, ch. 3, sec. 1 (42), the county of York includes the town of Toronto Junction, and there is nowhere in the statutes any definition narrowing the application of the word "county." The Public Schools Act, 1 Edw. VII. ch. 39, sec. 84, sub-sec. (3) (O.), requires the county council to pay to the treasurer of each public school within the county to which a model school is attached an annual grant. "County" in this section means the "county" referred to in the Territorial Divi-



sion Act. That is made clear by sec. 83, which deals with the appointment of boards of examiners, and provides that every county council shall appoint a board of examiners consisting of the inspector or inspectors having jurisdiction within the county, "including the inspector of any town separated from the county." This section, in effect, defines the meaning of the word "county" as used in connection with model schools, and, when read with secs. 82 and 84, shews that the intention of the Legislature was to give the county board of examiners jurisdiction over the territorial county.

*C. C. Robinson*, for the defendants. The town of Toronto Junction, being a separated town, is municipally independent of the county of York, and, under sec. 27 of the Municipal Act, R.S.O. 1897, ch. 223, is not subject to the jurisdiction of the county council; nor are the schools therein situated so subject. It is manifest from sec. 86 of the Public Schools Act, and other sections, that the word "county" as used in the Act is meant to refer to the county as established for municipal purposes. Under sub-sec. (3) of sec. 84, the county must give a grant to model schools "within" the county. A separated town is not a municipality within the county. Section 73 of the same Act shews this plainly when it speaks of "each minor municipality *within* the county," as distinguished from cities and separated towns. The High Schools Act, 1 Edw. VII. ch. 40 (O.), makes a special provision for county grants to high schools in separated towns, which would be unnecessary if such towns had been considered by the Legislature to be within the county. This special clause, which is sub-sec. (6) of sec. 34, was repealed during the last session of the Legislature, and another special enactment passed as to similar grants to high schools in separated towns. The clause as to inspectors compels the county to appoint city school inspectors on the county board of examiners, as well as inspectors in separated towns. No one could argue that the city of Toronto, for instance, is within the county of York for educational purposes. There is nothing in any of the statutes to shew that Toronto Junction is in any different position from the city of Toronto. The county paid the grant so long as the town was united with part of the township of York as a school section. The county

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council has no power to make such a grant now, any more than one in favour of a model school in another county. The Territorial Division Act does not apply to any provisions of the statutes regarding education.

*Raney*, in reply. The word "county," as used in the statute, sometimes means territorial county and sometimes means municipal county. It is always easy to understand what is meant by the context without having recourse to the cumbersome method of defining in each case the limitations of the word. The whole scope of the Public Schools Act indicates clearly the intention of the Legislature that the municipal separation of a town from its county should not interfere with school legislation. This is made evident when it is considered that a separated town may still be associated with neighbouring school sections for school purposes, and, as a matter of fact, until the year 1900 the town of Toronto Junction was so associated with sections 13 and 22 of the township of York.

March 17. BRITTON, J. :—For the purpose of this suit the allegations of fact as set out in the statement of claim and statement of defence are all admitted.

I am of opinion that the plaintiffs must succeed, and that they are entitled to the declaration as prayed.

Toronto Junction is territorially within the limits of the county of York, but it is a separate town, within the provisions of the Municipal Act, and as a municipality is not under the jurisdiction of the council of the county of York.

The whole question, shortly stated, is this :—Is Toronto Junction part of the county of York, within the meaning of secs. 83 and 84 of ch. 39, 1 Edw. VII. (1901), for educational purposes? That is to say, for the purpose of compelling the county of York to contribute to the maintenance of its model school, set apart by the board of examiners as one of the model schools of the county.

The county board of examiners is a board appointed by the municipal council of the county. That board must have as one of its members the inspector of any town (within the county) separated from the county. That board has jurisdiction within the county as to the subjects (limited in number) with which it

can deal. One thing the board of examiners can do; it can set apart at least one public school in the county as a model school for the training of teachers. Such a school, in my opinion, could by this board be established in a town (within the county), although separated municipally from the county.

If the board of examiners could do this now, it follows that this model school in Toronto Junction, properly set apart as a county model school, continues such, notwithstanding the separation of the town municipally from the rest of the county.

In this Act, as was stated upon the argument, the word "county" sometimes must be applied territorially and sometimes municipally. In this case I think the model school is a county school, although in the separated town.

Judgment for the plaintiffs with costs of the action on the High Court scale to be paid by the defendants to the plaintiffs.

E. B. B.

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Feb. 12.

*Contract—Statute of Frauds—Master and Servant—Employment for an Indefinite Term—Damages—Master and Servant Act, R.S.O. 1897, ch. 157, sec. 5.*

A sub-contract to employ a person as salesman so long as the employers' contract with third persons might remain in force, that contract being terminable at any time, is not within the 4th sec. of the Statute of Frauds, for the sub-contract may or may not continue for a year.

Such a sub-contract does not come within sec. 5 of the Master and Servant Act, R.S.O. 1897, ch. 157.

The employers' contract came to an end by the voluntary dissolution of their firm:—

*Held*, that this voluntary dissolution operated as a wrongful dismissal of the plaintiff under his sub-contract and that although the probable duration of the contract and consequently of his sub-contract would have been, apart from the dissolution of partnership, quite uncertain, he was entitled to substantial and not merely nominal damages.

THIS was an action to recover damages for wrongful dismissal, and was tried at London, on the 7th and 8th of January, 1902, before FERGUSON, J., in whose judgment the facts are stated.

*Talbot Macbeth*, K.C., for the plaintiff.

*Geo. C. Gibbons*, K.C., and *John J. Drew*, for the defendants.

February 12. FERGUSON, J.:—The action as it now stands is for an alleged wrongful dismissal of the plaintiff by the defendants. At the trial, and by the consent of counsel, the record was so amended as to claim in this action for the dismissal only, without prejudice, however, to the rights in respect of the other claim made by the plaintiff and referred to in the eleventh paragraph of the statement of claim.\*

The plaintiff says that on and prior to the 16th day of August, 1900, a company known as The Raymond Company of Guelph, being owners of the patent in Canada for the National Cream Separators, manufactured the same for sale by the defendants under an agreement whereby the defendants had the sole agency for the sale of these separators in the Province

\*A claim for an account and damages in respect of separators sold by the defendants.—REP.



of Ontario; and the defendants carried on business as dealers in the said separators in the Province of Ontario under the name of The Creamery Supply Company. That on or about the said 16th day of August, 1900, the defendants appointed the plaintiff their sole general agent for the sale of the said separators in the counties of Middlesex, Lambton, Essex, Kent and Elgin, and that an agreement was then made between the defendants and the plaintiff whereby it was provided that the plaintiff should have full control and management of the said counties for the sale of the said separators, with the sole right to appoint local agents (to be approved by the defendants) for the sale of the said separators in the said counties; and that it was further provided that the separators should be charged by the defendants to such local agents at such price (not less than \$60) as should be arranged between the plaintiff and such local agents, and that the plaintiff for his services should receive on each separator sold in the said counties either by himself or by such local agents the difference between \$57 and the price at which such separator should be sold by the plaintiff or charged by the defendants to the local agent to whom they shipped it. And that whenever The Raymond Company should make any reduction for manufacturing the said separators there should be a corresponding reduction in such sum of \$57. There are agreements by the defendants to fill all orders for separators received from the plaintiff and the local agents appointed by him, and also that the defendants would not sell any separators in the said counties to any person or persons other than the plaintiff and the local agents so appointed by him. The plaintiff says *it was further provided that this agreement between him and the defendants should remain in force so long as The Raymond Company should continue to manufacture the said separators for the defendants. But the plaintiff reserved the right to cancel the agreement at any time by giving three months' previous notice in writing to the defendants.*

The plaintiff entered upon his duties under the agreement and, as it appears, continued until his dismissal as of the 31st day of October, 1901, when the defendants gave him notice of the dissolution of their own partnership and, in effect, that his (the plaintiff's) services would be no longer required.

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At the trial there was not any material dispute as to the contents of the agreement, and, so far as I have been able to glean, the plaintiff has, in his statement of claim, set it forth with sufficient accuracy. The grave contention was in respect of the issue raised upon the defendants' pleading setting up the Statute of Frauds, they contending that no action could be sustained upon the agreement as a parol agreement, it being an agreement not to be performed within a year from the making thereof, and that there was no sufficient note or memorandum of it in writing signed by them. The plaintiff, on the other hand, contended that the Statute of Frauds had no application, and that, even if it had, he had shewn a sufficient note or memorandum, whereupon exhibits 1, 2, and 3 became the subject of prolonged and, I think I am right in saying, skilful arguments on either side of the case.

In the view, however, that I have taken of the matter I need not, as I think, consider those exhibits or the arguments in respect to them, or offer any opinion as to whether or not there was a sufficient note or memorandum to answer the requirements of the statute. The note or memorandum to which reference was made contained no material variance from the parol contract proved. The parties do not at all disagree as to the duration of the employment of the plaintiff or as to the way in which it is expressed in the fifth paragraph of the statement of claim, the words of which I have above set forth.

*The agreement was to continue in force so long as The Raymond Company should continue to manufacture the separators for the defendants.*

It was not disputed, it was in fact conceded on all hands, that The Raymond Company were in the circumstances at liberty to cease manufacturing the separators for the defendants at any time, whether before or after the expiration of a year after the making of the agreement between the plaintiff and the defendants. When the defendants dissolved their partnership they divided the Province between them, one taking the business of selling the separators in the west part and the other taking the business in the east part, the five counties in respect of which the plaintiff had had his agreement falling to the defendant Rudd. The Raymond Company have since the

period of the dissolution of partnership of the defendants been manufacturing separators for each of them, the former partners. The evidence, however, is that there is not, nor has there been, any connection between the two businesses. It was contended that this was and is a manufacturing by The Raymond Company for the former firm or company composed of the two defendants. I cannot, however, consider this argument tenable, and I am of opinion against it. I think the manufacturing by The Raymond Company for the defendants ceased upon the dissolution of the defendants' partnership. Now going back to the agreement and the terms of it. It is to me manifest that this contract must have come to an end, and, as to time, be performed at any time The Raymond Company should cease to manufacture the separators for the defendants. There was nothing to prevent their ceasing so to do at any time. It, as I think, might or might not be completed within the year. On this subject I refer to secs. 274, 275 and 276 of Browne on the Statute of Frauds, 5th ed.; Addison on Contracts, 9th ed., p. 34, where the author refers to, amongst other decisions, *McGregor v. McGregor* (1888), 21 Q.B.D. 424. I also refer to the language and citations of Lord Esher, M.R., in *McGregor v. McGregor*, at pp. 428 and 429, where he deals more or less with the case *Davey v. Shannon* (1879), 4 Ex. D. 81, and adopts the Irish case *Murphy v. Sullivan*, in Ex. Ch. 11 Ir. Jur. N.S. 111. I am decidedly of opinion that the Statute of Frauds has no application to the agreement in question. I am also of the opinion that the provisions of sec. 5 of R.S.O. 1897, ch. 157, have no application to it. As I understand the facts, The Raymond Company had not at, or prior to, the time of the dissolution of the defendants' co-partnership ceased to manufacture separators for the defendants. There was at that period, in my view, a valid and subsisting parol agreement between the plaintiff and the defendants. According to the decision in *Brace v. Calder*, [1895] 2 Q.B. 203, as I understand it, the fact of the dissolution, which was, of course, the act of the defendants, operated a wrongful dismissal of the plaintiff (or was a breach of the agreement). In *Brace v. Calder* there was a positive hiring for two years, which period had not expired at the time of the dissolution, which may differ the case from the present

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case with regard to breach of the contract. The defendants in the present case did, after their dissolution, dismiss the plaintiff which, in fact, differs it from *Brace v. Calder*. This, however, seems to me not of great materiality if it is assumed that the dissolution operated a dismissal of the plaintiff, as I think it did. There was, I think, a wrongful dismissal and the plaintiff has confined his action to a claim for damages for this alone.

It is pleaded by the defendants that the plaintiff after notice of the dismissal acquiesced in and approved of it. What is shewn is that the plaintiff applied to the defendant Rudd, to whom the five counties fell upon the dissolution and division of territory, for similar employment to that which he had under the agreement in respect of those counties, and that his application was refused. I do not see how this fact can change the position of the parties with respect to the dismissal, and I think the plaintiff entitled to some damages for the wrong.

The evidence shews that the plaintiff was realizing about \$50 per month in the clear in this employment. He seems to be a gentleman capable of doing business and obtaining other appropriate employment if opportunity offered. It is probable, I think, that if the dissolution of the defendants had not taken place The Raymond Company would have continued to manufacture separators for the defendants and so the plaintiff's employment would have continued, but one cannot say how long for The Raymond Company might have ceased at any time. The plaintiff says that he has endeavoured to obtain other suitable employment, but that he has been able in this way to realize only a trifling sum. In these circumstances I have been perplexed in endeavouring to fix the proper amount of damages the plaintiff should be paid. He should not, I think, be put off with only nominal damages, nor should he, as I think, recover heavy damages, and after the best consideration I have been able to bestow upon the subject I arrive at the sum of \$300.

There will, therefore, be judgment for the plaintiff for the sum of \$300, with costs, which, if necessary to say so, will be according to the High Court scale.



## [DIVISIONAL COURT.]

McCORMICK HARVESTING MACHINE CO.

V.

WARNICA.

1901

Sept. 27.

1902

March 4.

*Division Court—Jurisdiction—Breach of Undertaking—Amount Ascertained by Signature.*

Defendant gave two notes for \$75 and \$62 respectively on a form which contained an undertaking to give further security, and in the event of default in giving the security, that the notes might be treated as due.

Plaintiffs demanded further security, and not receiving same, brought an action on the notes before the time mentioned in them for their maturity had expired :—

*Held*, that notwithstanding the plaintiff had to prove a breach of the undertaking to give security before he could recover on the notes, the division court had jurisdiction to entertain the action.

*Petrie v. Machan* (1897), 28 O.R. 642, followed in preference to *Kreutziger v. Brox* (1900), 32 O.R. 418.

Judgment of the 10th division court of the county of York reversed.

THIS was an appeal from the 10th division court of the county of York.

The action was brought on two promissory notes for \$75 and \$62 respectively, given in settlement of a former action for the price of a binder machine, in which the defence was that the binder did not do good work, the memorandum of settlement being as follows :—

“ McCormick v. Warnica.

Action settled by defendant giving to plaintiffs two notes on plaintiffs' company's lien note form for \$75, due 1st Nov., 1901, and \$62, due 1st Dec., 1901, and plaintiffs agree to make machine work next season for the purpose of cutting defendant's grain as well as a Massey-Harris 1900 machine will work in same conditions and circumstances. Each party to pay their own costs.

Defendant to render friendly assistance and furnish team to run machine when required by the plaintiffs.”

The notes were taken on a form containing the following provision :—

“ I also promise and agree to furnish further security satisfactory to you at any time required. If I fail to furnish such

D. C. security when demanded . . . you may then declare this  
1902 note due and payable, even before other maturity of same, and  
suit therefor may be immediately entered, etc.”

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The plaintiffs' solicitors demanded further security, which the defendant neglected to furnish, and commenced an action on the notes on August 24th, 1901, and at the trial proved the demand for the further security, and the failure to furnish it.

The action was tried at Toronto on the 19th and 23rd days of September, 1901, before His Honour Judge MORSON, junior Judge of the county of York.

*F. C. Cooke*, for the plaintiffs.

*C. E. Hewson*, for the defendant.

September 27. MORSON, Co.J.:—The plaintiff, in order to be entitled to recover on the notes sued on, had to give evidence of a breach of a condition or covenant to furnish security, otherwise the notes are not due.

Having to do this, they brought themselves directly within the case, *Kreutziger v. Brox* (1900), 32 O.R. 418, which holds that under these circumstances the amount sued for is not ascertained by the signature of the defendant.

There is, therefore, no jurisdiction for me to try this case.

I give costs to the defendant Warnica.

From this judgment the plaintiff appealed, and the appeal was argued on March 4th, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET and BRITTON, JJ.

*Cooke*, for the appeal. The action was properly brought in the division court on the notes, and in them the amount was ascertained by the signature of the defendant. The fact that security was demanded and not given, which made the notes payable before the time for which they were drawn had arrived, made no difference. If *Kreutziger v. Brox*, 32 O.R. 418, is followed, the jurisdiction of the division court will be narrowed more than the Legislature intended: *Petrie v. Machan* (1887), 28 O.R. 642; *Re Sawyer-Massey Co. (Ltd.) and Parkin* (1897), 28 O.R. 662.

*Hewson*, contra. The action was not on notes but on agreements. He was stopped by the Court.

The Court considered they should follow the decision in *Petrie v. Machan*, 28 O.R. 642, and set aside the judgment entered, and ordered a new trial, directing that the action should be tried on the evidence already in. Costs to abide the event.

G. A. B.

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v.  
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[IN CHAMBERS.]

NESBIT V. GALNA ET AL.

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March 19.

*Security for costs—Residence of Plaintiff out of Ontario—Return—Ordinary Residence—Rules 1198 (b), 1199.*

The plaintiff was a British subject, and was always a resident of Ontario until his second marriage in 1896, since when he had been living and working part of the time in the State of Michigan and part of the time in Ontario; he had no property or means in Ontario; his wife had a home in Michigan, and after his marriage he made that his place of residence so far as possible, and had no other place of residence. When this action was begun in March, 1901, the plaintiff was at his wife's home in Michigan, and his solicitor indorsed that as his place of residence on the writ of summons. In January, 1902, after delivery of statements of claim and defence, the defendants obtained under Rule 1199, on præcipe, an order for security for costs. The plaintiff and his wife had then come to Ontario for the winter and were boarding at an hotel. The plaintiff stated on affidavit that he had come to reside permanently in Ontario:—

*Held*, that the plaintiff actually resided out of Ontario when the præcipe order was made; but, security not having been given, he might be relieved from that order if he was now actually, and intended to remain, a resident of Ontario. Upon the evidence, however, such was not the case; the plaintiff's place of residence was in Michigan, and was likely so to remain.

*Held*, also, that if the præcipe order were set aside, an order under Rule 1198 (b) for security for costs, on the ground that the plaintiff's ordinary place of residence was at his wife's home in Michigan, would be properly made.

AN appeal by the plaintiff from an order of the local Master at Sarnia dismissing the appellant's motion to set aside an order obtained on præcipe by the defendants whereby the plaintiff was required to give security for the defendants' costs of the action.

The writ of summons was issued on the 7th March, 1901. In the indorsement it was stated that the plaintiff resided at

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the town of St. Clair, in the State of Michigan; and it was upon that statement that the *præcipe* order was issued.

The defendant appeared in due course; the statement of claim was delivered on the 7th November, 1901; and the statement of defence on the 30th January, 1902.

The order for security for costs was issued on the 30th January, 1902.

The plaintiff, in support of his application to set aside the *præcipe* order, made an affidavit (dated 4th February, 1902) in which he stated that throughout the year 1900, with the exception of three months, he was resident in Ontario and carried on business on the Canadian lakes from Sarnia; that during the first three months of 1901 he resided between Sarnia and St. Clair, and since then he had resided in Ontario; since about May, 1901, he resided constantly on the north shore of Lake Huron on the Ontario side and at the town of Sault Ste. Marie, in Ontario, down to about the end of November; during the latter part of that time his wife resided there as well; upon the close of navigation in 1901 he and his wife took up their residence in the city of Windsor, Ontario, "and are now and have since been resident at the Crawford House, in said city of Windsor, and it is our intention to continue to reside permanently in Ontario." The plaintiff also stated that he was and always had been a British subject; that he had no property elsewhere than in Ontario; that he had resided during his whole lifetime in Ontario, with the exception that since his second marriage, six years before, he had "broken up house-keeping" in Sarnia, and, spending much of his time on the upper lakes, had spent as much of the winter months as he could at his second wife's home in the town of St. Clair; but they had now both come to reside permanently in Ontario.

Being cross-examined on his affidavit, the plaintiff said that he did not instruct his solicitors to describe him as living at St. Clair; that his wife's mother died about March, 1901, and he was in St. Clair from December, 1900, until April, 1901, living with his wife at her mother's home; he had no other place of residence at that time; he was married in 1896; his wife was then living at St. Clair; she spent a considerable portion of her time with him at different points on the Georgian Bay; she



lived with her mother; since his marriage in 1896 he was in business in Detroit until August, 1897; during that period he and his wife lived at Detroit; in the autumn of 1897 he went to the Georgian Bay, but his wife did not accompany him; she went back to St. Clair with her mother; he stayed at the Georgian Bay from the autumn of 1897 to the autumn of 1898, with the exception of a visit to his wife's mother's home for a month; he went to Gore Bay in the autumn of 1898, and stayed all winter, getting out pulp wood; in the summer of 1899 he was on a boat, not at St. Clair: his wife was with him at Gore Bay and Sault Ste. Marie in 1899, and went back to St. Clair in the autumn; he stayed up north till the close of navigation, and then went to St. Clair; made a trip north during the winter of 1899-1900, and during the season of navigation was engaged in getting out pulp wood; his wife was with him during that year, but came away before he did; in the year 1901 it was the same; his wife was at the Sault that summer; she left there early and went to visit friends; he and she met at St. Clair and lived in the mother's home for two months; they came from St. Clair to Windsor in December, 1901; he told the proprietor of the Crawford House that he might stay until spring, and arranged with him on a monthly basis; he was living at Windsor because it was cheaper to live there, and he preferred to live in Ontario. He also said: "My wife was to take care of her mother during her life and receive as compensation the property at St. Clair. This was a verbal arrangement, as far as I know. During the period of our marriage and up to the death of her mother she carried out that arrangement. With the exception of the times she was with me, my wife resided with her mother. I did not look upon St. Clair as my wife's home."

Rule 1198.—(1) Security for costs may be ordered . . .

(a) Where the plaintiff resides out of Ontario.

(b) Where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario.

1199.—(1) Where it appears, by the writ of summons . . . or by an indorsement thereon, that the plaintiff resides out of Ontario, the order may be obtained on præcipe, after

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appearance by the defendant applying therefor pursuant to any such writ of summons.

The appeal was heard by MEREDITH, J., in Chambers, on the 17th March, 1902.

*D. L. McCarthy*, for the plaintiff.

*J. D. Falconbridge*, for the defendants.

March 19. MEREDITH, J.:—The order was rightly made, not only under Con. Rule 1199, but also because the plaintiff actually resided out of Ontario at the time. His place of residence was in Ontario before his second marriage, but, after that event, it was at his wife's home, at St. Clair, in the State of Michigan.

That being so, the questions are:—(1) whether he now really resides in, and intends to reside in, Ontario; and, if so, (2) whether that circumstance is sufficient to relieve him from the order.

As to the latter question, the general impression seems to have been that at law it ordinarily would not relieve from the order and its effect, especially if security had been given; but that in equity it would: see *Badnall v. Haylay* (1838), 4 M. & W. 535, *Westenberg v. Mortimore* (1875), L.R. 10 C.P. 438, and *Hately v. Merchants' Despatch Co.* (1886), 12 A.R. 640, on the one hand; and *O'Conner v. Sierra Nevada Co.* (1857), 24 Beav. 435, *Mathews v. Chichester* (1861), 30 Beav. 135, and *Harvey v. Smith* (1866), 1 Ch. Ch. 392, on the other hand.

None of the cases, however, seems to lay down any clear and positive rule upon the subject. It has been suggested that no order for security ought ever to have gone in the *O'Conner* case: in the *Mathews* case the facts are very briefly stated: the orders in these cases were made by the same Judge. In the *Westenberg* case the plaintiff was a foreigner, domiciled in Holland, but occasionally residing in England: and in the *Badnall* case the facts are not fully stated; and, though one Judge seems to have proceeded upon the general principle that security once given must stand, the other Judge may be taken to have meant that the bond should remain to secure costs incurred during past absence and for costs which might be incurred during future absence, if any.

The plaintiff being a British subject; always a resident of Ontario until his second marriage, about six years ago, and even during that time frequently sojourning, and doing business, in Ontario; and security not having been given, but a præcipe order only obtained, I would feel authorized in relieving him from that order, if quite satisfied that he is now actually, and intends to continue, a resident of Ontario: see *Place v. Campbell* (1848), 6 D. & L. 113.

There is something to be said in his favour upon that question: his allegiance, his almost lifelong residence in Ontario, and his business engagements there in the past, as well as his recent actual abiding in Windsor: but there is rather more, at present, I think, to be said against it: he has no property or means in Ontario, he has been abiding in Windsor, and is there now probably, for the one reason that it is cheaper, for the time being, than "keeping house," his wife has property and means in Michigan, her home is there, she earned and became possessed of that home by living there, with her mother, after her own marriage with the plaintiff, until her mother's death, and her husband was content that she should, and made that home his place of residence; and I look upon it as really their place of residence yet, and likely to so remain: see *Marsh v. Beard* (1866), 1 Ch. Ch. 390, and *Watson v. Yorston* (1864), 1 U.C.L.J.N.S. 97.

Upon this ground the appeal fails; and it also fails upon another ground.

The local Master has found that the plaintiff's ordinary place of residence is at his wife's home at St. Clair, in Michigan, and that his residence in Ontario, boarding at an hotel, though for months past, is merely a temporary residence. I have not disagreed with him in that finding: the burden of proof was upon the plaintiff. Con. Rule 1198 (b) therefore applies, and the case is one in which an order for security for costs ought to be made; and nothing would be gained by setting aside the præcipe order, and making another order to the same effect.

The appeal is dismissed; costs in the action to the defendants only.

Meredith, J.  
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## [DIVISIONAL COURT.]

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THE CROWN CORUNDUM AND MICA COMPANY, LIMITED,

V.

Feb. 11.  
March 5.

LOGAN.

*Practice—Dismissal of Action—Undertaking to go to Trial—Default in Giving—Effect of.*

*Per MEREDITH, C.J.C.P.*—Where an order is made for the doing of an act, such as giving an undertaking to go to trial by a particular date, or in the alternative that the action should be dismissed, when default is made in the doing of the act the order operates to put an end to the action, and no further order is necessary, and the action being dead the Court has no power to relieve from the consequences of such default.

On an appeal, a Divisional Court being of opinion that under the circumstances the action should be dismissed, declined to consider the question of the necessity of a further application or the power to relieve from the default.

THIS was an appeal by the plaintiff from a judgment of Meredith, C.J.C.P., in Chambers, reversing an order of the Master in Chambers, giving the plaintiff leave to proceed to trial.

The facts sufficiently appear in the judgment appealed from.

The appeal from the Master was argued on February 7th, 1902.

*G. M. Macdonell*, K.C., for the appeal.

*W. E. Middleton*, contra.

February 11. MEREDITH, C.J.:—This is an appeal by the defendants from an order of the Master in Chambers, dated the 31st January, 1902, by which he assumed to give to the respondents the right to go down to trial at the Peterborough non-jury sittings, to be held on the 27th May next, although they had not given the undertaking to go to trial at Peterborough, in default of which their action was ordered to be dismissed by a previous order of the 5th October, 1901.

The order of the 5th October, 1901, was made on a motion by the appellants, to dismiss the action for want of prosecution, and by it, it was ordered that in default of the respondents undertaking within four weeks to bring the action to trial at



the sittings, to be holden at Peterborough in December then next and proceeding to trial at that sittings, the action be dismissed with costs.

That order was affirmed by me, and afterwards by a Divisional Court, which refused to extend the time for bringing the action to trial, or to relieve the respondents from the consequences of their having failed to give the undertaking mentioned in the order.

After the affirmance of the order by the Divisional Court, and long after the expiry of the four weeks allowed to the respondents for giving the undertaking, the appellants, under the erroneous idea, that a further order dismissing the action, because of the respondents' default in giving the undertaking, was necessary, applied to the Master in Chambers for such an order, and it was upon that application, that the order now appealed from, was made.

I am of opinion that the Master in Chambers had no jurisdiction to make the order appealed from, and that even if he had had jurisdiction to make it, it would have been improper to do so, after the refusal of the Divisional Court, to which I have referred, to relieve the respondents from the consequences of their default or to extend the time for bringing the action to trial.

At the time, when the application to the Master in Chambers was made, the action stood dismissed, and was therefore at an end, and it is clear upon the authorities that, at all events in the case of such orders as that of the 5th October, 1901, where default is made, the order operates to put an end to the action at and from the expiration of the time allowed for doing the act or taking the proceeding: *Whistler v. Hancock* (1878), 3 Q.B.D. 83; *King v. Davenport* (1879), 4 Q.B.D. 402; *Carter v. Stubbs* (1880), 6 Q.B.D. 116; *Hollander v. Ffoulkes* (1894), 16 P.R. 225.

While an appeal from the order was pending, an order extending the time for bringing the action to trial might have been made, but not afterwards (*Carter v. Stubbs, supra*), and the time for appealing from such an order may be extended though it has expired: *Carter v. Stubbs*; *Burke v. Rooney* (1879), 4 C.P.D. 226.

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Mr. Middleton cited *Collinson v. Jeffery*, [1896] 1 Ch. 644, as an authority for his contention, that a further order dismissing the action was necessary before the action could be treated as dead.

If *Collinson v. Jeffery* were inconsistent with the other cases to which I have referred, I should of course be bound to follow those cases, as one of them is a decision of the Court of Appeal, in preference to it. It may, however, be pointed out that Mr. Justice Kekewich, who decided *Collinson v. Jeffery*, distinguished it from the previous cases and recognized that a different rule, from that which he adopted, was applicable where the order was one dealing with the dismissal of an action for want of prosecution.

In *The Script Phonography Co. v. Gregg* (1890), 59 L.J. Ch. 406, *Whistler v. Hancock*, and *King v. Davenport*, and cases like them, were treated by Mr. Justice North as settling the law on the point before him, which was the same as that which I am considering, though in that case, the order as drawn up was that the action should "stand dismissed" for want of prosecution, without further order. Nothing, however, appears to have turned on the form of the order; but, on the contrary, the orders which were dealt with in *Whistler v. Hancock* and *King v. Davenport*, were treated as having the same effect as that order.

The order of the Master in Chambers must, therefore, be discharged, and in lieu of it an order made, dismissing the application of the appellants upon which it was made, without costs.

The appellants should not be allowed the costs of the motion, because it was unnecessary and improper.

The respondents must pay the costs of the appeal.

From this judgment the plaintiffs appealed, and the appeal was argued on March 5th, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET, J.

*Middleton*, for the appeal. The practice uniformly adopted in our Courts, where an order is made directing an act to be done, and a penalty is provided for non-compliance with that order, upon default happening, a further application is

necessary, and the action is not *ipso facto* dismissed. Until an order has been made actually dismissing the action, it is still pending, and the Court has power to extend the time for doing the act and to relieve from the default: *Bank of Minnesota v. Page* (1887), 14 A.R. 347, *per* Osler, J.A., at p. 350; see also *Hollander v. Ffoulkes* (1894), 16 P.R. 315, where the Divisional Court reversed the decision of Street, J. (16 P.R. 225), relied upon in the judgment in appeal. See also *Dunn v. McLean* (1874), 6 P.R. 156, and Con. Rule 1203. In *Collinson v. Jeffery*, [1896] 1 Ch. 644, the distinction between an order of this class and an order providing that upon default in doing a certain act within a limited time "the action do stand dismissed out of this Court without further order," is pointed out. The difference is one of substance and intention and not of form only. Here, the Master, in the exercise of his discretion, relieved from the default. By the order of the 5th of October, 1901, the plaintiffs were directed to give an undertaking within four weeks. They immediately appealed from that order, and had the appeal been disposed of promptly, they could have given the undertaking within the time limited; but judgment was reserved and not given until it was too late to comply with the order. A litigant ought not to be deprived of his right by reason of the delay of the Court in giving judgment upon an appeal authorized by the Rules. If, under these circumstances, the Court cannot relieve—to use the words of Lindley, M.R.: "Substantial justice is sacrificed to a wretched technicality:" *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q.B. at p. 508; *South African Territories v. Wallington*, [1898] A.C. at p. 313.

*G. F. Macdonell*, *contra*, was not called on.

The Court were of opinion that the appeal should be dismissed. In their view, it was not necessary to consider the main question argued, as even assuming that a further order was necessary and the action was not "dead" upon the expiry of the time limited by the order of 5th October, 1901, the plaintiff was entitled to no indulgence, and the Master in Chambers ought to have dismissed the action upon the motion before him.

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Feb. 13.

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## THE CORPORATION OF THE TOWNSHIP OF ELLICE ET AL.

*Malicious Procedure—Illegal Arrest—Joint Conviction—Invalid Warrant—Indemnity Resolution by Municipal Corporation—Ultra Vires—Constable—R.S.O. 1897, ch. 88, secs. 1 (2), 13, 14—Code 975, 976, 980.*

The plaintiffs on the information of the defendant, a constable, and another constable were summoned before a magistrate charged with wilfully damaging a spring of water on a highway but did not attend, and in their absence were convicted and jointly fined. A question having been raised as to the regularity of the proceedings, the magistrate hesitated about issuing a warrant until the defendants, the township council, passed a resolution indemnifying him against costs, which they did.

The warrant, directed "To all or any constables," etc., was issued, following the form of the conviction, and handed to the defendant constable and another constable, who between them arrested the plaintiffs, who were imprisoned until the fine and costs were paid.

In an action against the township council and one of the constables for maliciously enforcing an illegal warrant:—

*Held*, that the defendant constable had acted as such in the execution of the warrant and was entitled, although he had laid the information, to the protection extended by law to public officers of the peace; that the warrant being bad on its face, he was by virtue of sec. 21 of the Code exempt from all criminal responsibility, and was protected from a civil action by virtue of R.S.O. 1897, ch. 88, secs. 1 (2), 13 and 14, and secs. 975, 976 and 980 of the Code; the action not having been brought within six months, and no notice of action having been given.

*Ex parte McCleave* (1900), 35 New Bruns. R. 100, distinguished.

*Held*, also, that there was no proof of knowledge on the part of the council that either the conviction or warrant was illegal or that they were acting other than *bond fide* for the protection of the spring, and no evidence of malice; that even assuming knowledge by the council of the invalidity of the conviction and warrant, the resolution was *ultra vires*, and they were not bound to make good any costs or damages in consequence of the resolution. *McSorley v. The Mayor, etc., of the City of St. John* (1881), 6 S.C.R. 531, distinguished.

Judgment of the county court of the county of Perth affirmed.

THIS was an appeal by the plaintiffs from the county court of the county of Perth, in an action, brought by Charles Gaul, his wife Margaret Gaul, and one Annie Bain against the municipal corporation of the township of Ellice and one John Murr, a constable, for malicious arrest, and for a return of \$53.05 paid as a fine and costs in order to obtain their liberty.

The action was tried on the 15th and 17th June, 1901, before Barron, Co. J., with a jury.



It appeared at the trial that the plaintiffs had been convicted on the information of the defendant Murr, under sec. 511 of the Code, "for that the said" (the plaintiffs) "did at . . . on . . . wilfully commit damage, injury or spoil to or upon the highway," etc.

The conviction then proceeded: "and I adjudge the said" (three plaintiffs) "for the said offence, to forfeit and pay the sum of \$20 for penalty and \$10 for compensation to be paid and applied according to law, and also to pay to the complainant, John Murr, the sum of \$23.05 for his costs," and if not paid "I adjudge the said" (three plaintiffs) "to be imprisoned," etc.

It was alleged by the plaintiffs, that the magistrate, being aware that the conviction was bad, refused to issue a warrant until indemnified by the defendants, the corporation, under the resolution set out in the judgment.

The warrant was then issued to another constable, one Maurer, who called to his assistance the defendant Murr, and they arrested the plaintiffs, conveyed them to gaol, and kept them there, over night, until the \$53.05 was paid to obtain their liberty.

*J. P. Mabee*, K.C., for the plaintiffs.

*G. G. McPherson*, K.C., for the defendants.

The trial Judge withdrew the case from the jury and gave judgment in favour of the defendant, Murr, holding that he was justified in what he did under secs. 15, 16, 17 and 18 of the Code; that he was not acting with malice or without reasonable and probable cause in obeying the warrant; that the action was not brought within six months; that no notice of action was given to him, and that he was entitled to the protection of secs. 1, 13 and 14 of R.S.O. 1897, ch. 88.

As to the defendant corporation, the Judge found that the corporation did not institute the proceedings, or undertake to pay any damages suffered by the plaintiffs, but did pass a resolution indemnifying the magistrate against any costs incurred in the proceedings, and that they had no legal right to do so, and such act was *ultra vires*, and that though they might possibly be liable to an action as individuals, they were not liable as a corporation.

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He reserved the question of the validity of the conviction and warrant, and the right of the plaintiffs to recover the \$53.05 back, dependent upon that, and held, as against the corporation, that it was not necessary to first quash the conviction in order to recover the \$53.05.

*Mabee*, for the plaintiffs, objected to the case being withdrawn from the jury, and contended that it was for the jury to find whether the corporation instituted the proceedings, and to construe the indemnity resolution.

A subsequent judgment was delivered by the learned county Judge, holding that the act, of which the plaintiffs were alleged to be guilty, did not arise from their joint act, but was complete in each one separately: 2 Hawkins' Pleas of the Crown, ch. 25, sec. 89; and each was by himself or herself a wrongdoer: *Regina v. Sutton* (1877), 42 U.C.R. 220; that the conviction was informal and irregular, and that money paid under it, under protest, as in this case, could be recovered back: *Pollett v. Hoppe* (1847) 17 L.J.C.P. 76; but as only \$30 of the amount paid by the plaintiffs had been paid to the defendant corporation by the magistrate, he gave judgment against the corporation for that amount with costs on the division court scale, with a set-off of costs of the defence on the county court scale.

From these judgments the plaintiffs appealed, and the appeal was argued on the 5th December, 1901, before a Divisional Court composed of BOYD, C., FERGUSON, and ROBERTSON, JJ.

*Mabee*, for the appeal, contended that the conviction was bad on its face, and the warrant would not have been issued but for the interference of the corporation by its resolution: that their conduct caused its issue and the arrest which followed, and which took place with undue harshness; that what they did was outside the whole scope of their powers, and that Murr interfered in the arrest, although he was not mentioned in the warrant, nor was it handed to him to execute, but to another constable, and that Murr, having laid the information, or being the informer, was disqualified from acting in the execution of the warrant, and so was not entitled to the ordinary protection afforded by law to constables as

public officers: *Ex p. McCleave* (1900), 35 New Bruns. R. 100; *Eastman v. Reid* (1850), 6 U.C.R. 611; *McSorley v. The Mayor, etc., of the City of St. John* (1881), 6 S.C.R. 531; *Abrath v. The North Eastern R.W. Co.* (1886), 11 App. Cas. 247; *Morgan v. Brown* (1836), 4 A. & E. 515; *Griffith v. Harries* (1837), 2 M. & W. 335, and secs. 21, 31, 33 and 511 of the Code.

*McPherson*, contra, contended that Murr laid the information in performance of his duty; that the warrant was addressed to all constables and peace officers generally, and was handed to Maurer for execution, who took Murr with him to assist as there were three persons to be arrested; that there was no undue force used with two of them, but the third resisted and had to be compelled to go; that the constable was protected in acting on the warrant: Code, sec. 21; that the action was not brought within six months, and no notice was given: R.S.O. 1897, ch. 88, secs. 1, 13 and 14; that the resolution of the corporation did not cause the arrest, nor were they in any way answerable for what took place; that a municipal corporation differed from a joint stock corporation, in that no action was maintainable against a municipal corporation for malicious prosecution; and that their resolution was *ultra vires*: *Dillon on Municipal Corporations*, 4th ed., 1183; *Eaves v. Nesbitt* (1901), 1 O.L.R. 244.

February 13. BOYD, C.:—So far as the defendant, Murr, is concerned, the action is for enforcing an illegal warrant of arrest and therein assaulting the plaintiffs.

Upon the facts, it appears that a conviction was made against the defendants, under sec. 511 of the Code for interfering with and spoiling a spring of water at the side of the highway, but that, as drawn up, it was bad, because of awarding one fine against the three: *Regina v. Sutton*, 42 U.C.R. at p. 224.

Murr laid the information in conjunction with one Hishon, who was interested in the preservation of the spring, and it appears in several places in the evidence, that he was a constable and peace officer of the neighbourhood.

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The warrant was drawn up as usual, addressed "To all or any of the constables," etc., and was, according to one statement in the evidence, handed to Murr for execution; according to another statement, it was handed to one Maurer, also a constable, to be executed. At all events, one called in the other to assist in the execution, as there were three persons to be arrested and conveyed to jail, and both could lawfully act under the general direction of the warrant.

It is alleged in the pleadings, and clearly proved in the evidence, that the defendant was a constable and acted as such in the execution of this warrant, and he is entitled to all the protection extended by law to public officers of the peace.

The warrant being bad on its face, as following the conviction, section 21 of the Code applies, which exempts the persons acting under it from all criminal responsibility, but this leaves him liable to a civil action.

But in regard to a civil action he, as constable, is protected by R.S.O. 1897, ch. 88, secs. 1 (2), 13 and 14 which are pleaded, and by virtue of which he is exculpated.

This action was not brought within six months of the matter complained of, nor has any notice of action been given. See also Code, sections 975, 976 and 980.

*Exp. McCleave*, 35 New Bruns. R. 100, cited to establish that the defendant, being the informer, was disqualified to act as the executive officer to enforce the warrant, and thereby lost the privilege or protection of his office, does not justify such a conclusion in this case.

Three Judges held under the provisions of the Canada Temperance Act, that the prosecutor, being personally liable for costs if he failed, was not competent to execute a search warrant or an order for the destruction of the liquor. The Chief Justice and another Judge dissented, and another, a sixth Judge, gave no opinion.

The decision is contrary to *Regina v. Heffernan* (1887), 13 O.R. 616, and rests on the special legislation and provisions as to costs in the particular statute, and even if well decided, ought not to be read as applicable to the ordinary course of criminal procedure.



Here the defendant was associated with another in the institution of the complaint, and he was associated with another in the enforcement of the warrant, and I see no reason why he should lose the advantage of his position as a public officer.

This disposes of the case as to the individual defendant, for there is no statement on the record, and no issue joined, as to any undue or excessive violence having been used, though it is sought to evolve that cause of complaint by reason of some evidence of a slight scuffle having arisen at the time of the arrest.

It remains to deal with the corporation defendants, who are made parties because, it is said, the magistrate was induced to issue the warrant in question on the strength of a resolution passed by the council to indemnify him as to costs.

The action is for maliciously enforcing an invalid conviction.

The facts are these: The magistrate had proceeded *ex parte* to convict, after the parties had been summoned and had made default. The legal difficulty was then raised, that the proceedings were nugatory, because the summons served had no seal.

The magistrate took the advice of the county attorney on this, and upon that advice he issued the warrant. He says, "If I had been advised that the summons was not legal, I would not have issued the warrant" (*i.e.*, to arrest).

It was stated to the council that the magistrate would not hand the warrant to the constable till a resolution was passed as to costs, and as soon as the resolution was passed, the warrant was handed by the magistrate to the constable.

The resolution is in these words: "It was unanimously resolved by the council of Ellice that the corporation of the township will stand and be responsible for any costs, that may be caused by the suit of Mr. Murr vs. Chas. Gall (and others), *re* enforcing the judgment of Robert Armstrong, magistrate, in the matter of said suit."

There is no proof that the conviction or warrant was brought before the council, or that there was any knowledge of its illegality on the ground of joint fine, and no proof that the council was acting other than *bonâ fide* for the protection of the spring on the highway. There is no evidence of malice.

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But assume that imputed knowledge of the invalid conviction and warrant is to be attributed to the corporation, then their resolution to put it in force, or to pay any costs of putting it in force, was *ultra vires*. It transcends the statutory powers of any municipal corporation to award funds for illegal purposes. The element of public character in this municipality forbids the council passing such a resolution so as to bind the corporation, *i.e.*, all the inhabitants.

Neither is the corporation, as such, bound to make good such costs, nor is the corporation, as such, liable in damages for any action taken by the magistrate in consequence of such unwarrantable resolution.

This act of the council does not bind the corporation, and the legal consequences of any illegal conduct, arising from it are to be visited, not on the municipality, but upon the offending members who passed the resolution: *Cornell v. The Town of Guilford* (1845), 1 Denio N.Y. 510; *Pocock v. The Corporation of the City of Toronto* (1896), 27 O.R. 635, at p. 639; and *Ferguson v. Earl of Kinnoull* (1842), 1 Bell, Sch. App. 662; *The Mayor, etc., of the Municipal Borough of Tynemouth v. The Attorney General*, [1899] A.C. 293.

*Respondeat superior*, on which doctrine, *McSorley v. The Mayor, etc., of the City of St. John*, 6 S.C.R. 531, proceeded, has no application to this controversy, for the justice of the peace and the constables were acting as Dominion officials in the enforcement of criminal law.

I think that the correct result is that the action was rightly dismissed, and the judgment is affirmed with costs.

FERGUSON, J.:—I concur in the above judgment.

ROBERTSON, J., also concurred.

G. A. B.

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## SUTTON ET AL. V. VILLAGE OF PORT CARLING ET AL.

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*Survey—Village Lots—Authorization—R.S.O. 1887, ch. 152, sec. 39—Statutory Requirements—Order in Council—Resolutions of Municipal Council—By-law—Cost of Survey—Assessment for—Proprietors Interested.*

The council of an incorporated village, upon its own motion, passed a resolution "that the council do write to the Lieutenant-Governor and council to send a surveyor to finally settle disputes in regard to Port Carling streets." The clerk of the council thereupon wrote a letter, addressed to the Lieutenant-Governor in Council, stating that there had been great dissatisfaction with regard to the surveyor's lines of the village lots known as "the Bailey estate," composed of about 114 lots; that the lines had been run more than once since the original survey, and each time had been altered; that the village council had been applied to repeatedly to have the work done by an experienced surveyor, appointed by "your honourable council," under sec. 39 of R.S.O. 1887, ch. 152, and to have the boundaries of the lots ascertained and marked; and asking the council to "decide in favour of this." In answer the assistant commissioner of crown lands wrote as follows: "Referring to yours . . . asking that certain streets on which are about 114 lots known as 'the Bailey estate' be re-surveyed, owing to the original survey having become obliterated, . . . you understand the survey will have to be at the cost of the municipality; and the survey will consist, under R.S.O. 1887, ch. 152, sec. 39, of planting posts at the angles of the lots on Bailey street, Joseph street, . . . and a street . . . which, it appears, has no name. These are the streets on which the Bailey lots front, and I presume that a post planted at the front angles of these lots would be all that the municipality would require. . . . Let us know at once, and . . . give us the name of the surveyor to whom you wish instructions to issue." Thereafter a resolution was passed by the village council "that the clerk be instructed to order a surveyor to locate the streets of the village at once." The clerk then wrote to the commissioner of crown lands that the council had decided to employ C., a land surveyor, "to run the lines on certain streets and lots on the Bailey estate. An order in council was passed by which C. was instructed to survey the village lots of the Bailey estate and to plant durable monuments at the front angles of each of these lots, on Joseph street, Bailey street, and a street south of Bailey street, unnamed in the original survey, and he did as he was instructed. The village council then passed a by-law directing that the sum of \$290.77, being the cost of the survey, should be levied on the proprietors of the lands surveyed, being the village lots of the Bailey estate:—

*Held*, that the survey directed was not authorized and was illegal, the requirements of the statute (R.S.O. 1887, ch. 152, sec. 39), not having been complied with so as to give the Lieutenant-Governor in council jurisdiction to authorize the survey.

2. That the survey being illegal, the municipal council had no power to pass a by-law to levy the cost of it.
3. That, if there was jurisdiction to authorize the survey, it could only be at the cost of the proprietors of the lands in each range or block interested, and not of all the proprietors, whether interested or not.

*In re Scott and County of Peterborough* (1866), 26 U.C.R. 36, followed.  
*Regina v. McGregor* (1868), 19 C.P. 69, distinguished.

THIS action was brought by George H. Sutton and others against the corporation of the village of Port Carling and

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Henry Martin, the collector of taxes appointed by the corporation for the year 1901, to have it declared that certain assessments under by-law No. 48 of the village corporation, made on the plaintiffs, were illegal and void, that the by-law was *ultra vires* of the village council to enact and enforce and should be quashed, and to have the defendants enjoined from collecting the several amounts levied against the plaintiffs under and by virtue of the by-law.

The by-law in question was passed on the 18th November, 1899. It authorized the levying of \$290.77 to defray the cost of survey of and planting of durable monuments on certain lands in the village of Port Carling. The by-law recited that questions had arisen as to the location and boundaries of village lots of the Bailey estate in the village and as to the location of certain streets shewn in the original survey of the village plot; that, in pursuance of a resolution of the village council of the 4th September, 1897, application was made to the Lieutenant-Governor in council to cause a survey of such lots to be made and durable monuments to be planted at the front angles of each of the lots on Joseph street, Bailey street, and a street south of Bailey street unnamed in the original survey; that, in pursuance of such application, an order in council of the 26th January, 1898, was passed, and instructions were issued to one A. G. Cavana, a provincial land surveyor, by the commissioner of crown lands, to survey such lots and to plant durable monuments; that such survey was duly made, and returned to the commissioner of crown lands, who duly confirmed the same on the 20th January, 1899; and that the village council had caused to be laid before them an estimate of the sum requisite to pay the expenses to be incurred, in order that the same might be levied on the proprietors in proportion to the quantity of land held by them respectively, which cost amounted to \$290.77. The by-law then enacted that the sum of \$290.77 should be levied on the proprietors of the lands surveyed, being the village lots of the Bailey estate, as set out in a schedule, and being 73 lots and parts of lots, containing altogether  $137\frac{1}{10}$  acres. The by-law then declared that the sum to be levied should be at the rate of \$2.13 per acre on each proprietor, and that such sum should be collected from the proprietors in



proportion to the quantity of land held by each of them respectively at the time of such survey and at the passing of the by-law, in the same manner and at the same time as the municipal taxes were to be levied.

In the schedule appeared the name of the plaintiff George H. Sutton as owner of lots 49, 50, 51, and 92, on Joseph street, and lot 97 on Bailey street, containing together  $20\frac{4}{10}$  acres; lots 49, 50, and 51 having a frontage on Joseph street of 2 chains,  $94\frac{1}{2}$  links; lot 92 having a frontage of 2 chains, 1 link; and lot 97 on Bailey street having a frontage of 9 chains,  $92\frac{1}{2}$  links, and running down to the waters of Silver Lake, and containing  $17\frac{4}{10}$  acres.

And the name of the plaintiff Richard C. Harris appeared as owner of lots 67, 68, 69, 70, 71, and part of 72 on Bailey street, containing together  $10\frac{1}{2}$  acres. These lots, with the exception of 67, contained each a frontage of 1 chain, 99 links, and were 10 chains, 5 links, in length. Lot 67 was irregular and three-sided, being bounded on the west by the waters of Indian River.

And the name of the plaintiff David Massey appeared as owner of part of lot 80 ( $1\frac{1}{2}$  acres) and lot 81, on Joseph street, and 82, 83, and 84, on Silver street—together containing 15 acres; lot 81 having a frontage of five chains on Joseph street; lots 82 and 83 having a frontage each on Silver street of 5 chains; and lot 84 having a frontage of 6 chains, 39 links, on Silver street, but being irregular in shape, and bounded on the west by the waters of Indian River.

And the name of the plaintiff Peter M. Shannon appeared as owner of part of lot 99, said to contain 12 acres, and situated on Bailey street; but forming no part of the Bailey estate.

There also appeared the name of Robert Bailey as owner of lots 63, 64, and 65, on Bailey street, each having a frontage of 1 chain, 99 links, and containing together 5 acres. And Matthew McDermott's name was on the list as owner of lot 62 on Bailey street, which had a frontage of 1 chain and 99 links, and contained 1 acre.

The schedule also shewed that there were in all 36 owners of lots, who had been charged or assessed for the expenses of this survey; that the four plaintiffs' shares under the by-law

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amounted to \$123.33, being \$2.13 per acre on the  $57\frac{9}{10}$  acres which they owned.

Then the plaintiffs alleged by their statement of claim that in March, 1901, the defendants seized certain goods of the plaintiffs and threatened to sell them to make the moneys claimed under the by-law, and would have sold the same had they not been restrained by injunction from so doing; which restraint was continued until the trial or other disposition of this action; that the defendants exceeded their jurisdiction and statutory powers in enacting the by-law and levying the rates or taxes upon the plaintiffs, and the same was wholly void and should be quashed; that no resolution in accordance with R.S.O. 1887 ch. 152, sec. 39, was passed by the council, nor were the other provisions of the statute obeyed by the council, prior to passing said by-law, nor was the by-law published or registered, and it was void; that the council did not make any estimate of the expense to be incurred in and about the intended survey, etc., before entering upon the survey; that the moneys sought to be levied were greater and included expense beyond that legally chargeable against the plaintiffs; that the survey was wholly unauthorized and illegal, etc.; that the plaintiffs' lands were not affected or benefitted by such survey; and that their lands did not lie within the limits of the territory mentioned in the communication from the clerk of the council, bearing date the 13th September, 1897, to the Lieutenant-Governor in council.

The defendants by their statement of defence alleged that the council on the 4th September, 1897, passed a resolution that it was expedient to place durable monuments at the front or rear angles of certain lots in their village, and thereafter applied to the Lieutenant-Governor requesting him to cause a survey of such lots to be made, and such boundaries to be planted under the authority of the commissioner of crown lands; that, in pursuance thereof, an order in council bearing date the 28th January, 1898, was passed and instructions were issued to A. G. Cavana, an Ontario land surveyor, by the commissioner, to survey said lots and to plant durable monuments, etc.; that the survey was duly performed, and was duly confirmed on the 20th June, 1899, according to the provisions

of the Survey Act, the cost of which amounted to \$290.77; that the defendants' council on the 18th November, 1899, passed the by-law referred to in the plaintiffs' statement of claim, for the purpose of levying from the proprietors of the lots the amount of the cost in proportion to the quantity of land held by them respectively; that the plaintiffs were four of such proprietors, and as such became liable to pay, as their proper shares of said cost, as follows: the plaintiff Sutton, \$45.45; the plaintiff Harris, \$22.37; the plaintiff Massey, \$31.95; and the plaintiff Shannon, \$25.56; and the defendants said that the plaintiffs had always been aware of all the facts hereinbefore set out, and took the benefit of the survey, and were now estopped from objecting to any irregularities (if any there were) in the steps leading to the survey and the passing of the by-law; that the survey and by-law affected 36 proprietors, all of whom but the plaintiffs had paid their shares of the cost of the survey; that the plaintiffs refused to pay the amounts due by them, and the plaintiff Massey, in addition, was in arrears to the extent of \$8.21 in respect of his general taxes rightfully imposed, and the defendants' corporation, by the collector, the defendant Martin, proceeded to collect those sums from the plaintiffs, which was the trespass complained of. They also pleaded the provisions of R.S.O. 1897 ch. 223, sec. 468, as a bar to the plaintiffs' claim to set aside the by-law.

In reply the plaintiffs joined issue, and specifically denied the passing of the resolution alleged by the defendants, and that the plaintiffs took any benefit under said survey, and alleged that they always objected thereto.

The action was tried before ROBERTSON, J., without a jury, at Bracebridge, on the 25th November, 1901.

*R. D. Gunn and T. E. Godson*, for the plaintiffs.

*C. E. Hewson*, for the defendants.

January 22. ROBERTSON, J.:—The statute in force at the time the council of the municipality took action in the matter was R.S.O. 1887 ch. 152, sec. 39, which (reading it as it applies to incorporated villages) declares that "whenever the municipal council of any incorporated village adopts a resolution, on

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application of one-half of the resident land-holders to be affected thereby, or upon its own motion, that it is desirable to place stone or other durable monuments at the front or at the rear, or at the front and rear angles of the lots in any range or block or part of a range or block in their incorporated village, such municipal council may make application to the Lieutenant-Governor, in the same manner as is provided in section 38, praying him to cause a survey of such range or block, or part of range or block, to be made, and such boundaries to be planted, under the authority of the commissioner of crown lands."

On reference to sec. 38, it will be seen that authority is given to the municipality of a township to apply to the Lieutenant-Governor when "some of the concession lines and side road lines were not run in the original survey performed under competent authority, and the survey of some of the concession lines and side road lines, or parts of the concession lines and side road lines, have been obliterated, and owing to the want of such lines the inhabitants of such concessions are subject to serious inconvenience, therefore the municipal council of the township in which such lines are situated may . . . apply," etc.

The first step taken in this matter was the passing of a bald resolution by the council, without any application, formal or otherwise, being made to them by the land-holders affected or interested, except the councillor Robert Bailey, who moved the same, on the 4th September, 1897, "that the council do write to the Lieutenant-Governor and council to send a surveyor to finally settle disputes in regard to Port Carling streets;" not designating the streets, blocks, or ranges, in which disputes had arisen, or why the services of a surveyor were necessary "to settle disputes."

But on the 30th September, 1897, the clerk of the municipality wrote a letter directed "To the Lieutenant-Governor in Council," in which he says: "I am directed by the reeve and council of the above municipality to apply to you to aid us in the following matter. Since incorporation, some two years since, the village lots on the portion known as the Bailey estate, composed of about 114 lots, which are nearly all sold



and the majority built upon, there has been great dissatisfaction with regard to the surveyor's lines. The lines having been run more than once since the original survey, and each time the lines have been altered; which is very unsatisfactory. The consequence is that the council have been applied to repeatedly to have the work done by an experienced surveyor, appointed by your honourable council, under sec. 39 of ch. 152; and to have the boundaries of the said lots ascertained and marked. If your honourable council would decide in favour of this, it would be a great benefit to us, and save a great many disputes and encroachments. If you would please to let us know your decision if favourable, we should be glad to have the work done before unfavourable weather sets in."

On the 13th October, 1897, Mr. Aubrey White, assistant commissioner of crown lands, replied to the clerk as follows:—"Referring to yours of the 30th ultimo on behalf of the reeve and council of the municipality of Port Carling asking that certain streets on which are about 114 lots known as 'the Bailey estate,' be re-surveyed, owing to the original survey having become obliterated, I have to say that of course you understand the survey will have to be at the cost of the municipality, and the survey would consist, under the 39th section of ch. 152, Revised Statutes of Ontario, of planting posts at the angles of the lots on Bailey street, Joseph street, in said municipality, and a street south of Bailey street, which, it appears, has no name. These are the streets on which the Bailey lots front, and I presume that a post planted at the front angles of these lots would be all that the municipality would require. If this be so, if you let us know at once, and also if you would give us the name of the surveyor to whom you wish instructions to issue, the matter will then be laid before the Lieutenant-Governor, so that an order-in-council may be passed authorizing such survey."

The council of the corporation having allowed the matter to drop to all appearances, Mr. Aubrey White, on the 15th December following, wrote to the clerk requesting a reply to his letter of the 13th October. And on the 15th December, at a meeting of the council, it was "moved by J. S. Wallis, seconded by R. Mahon: that the clerk be instructed to order a surveyor to

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Robertson, J. locate the streets of the village at once." This was carried.  
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SUTTON 10th January, 1898, when the clerk wrote the following letter  
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"The council having decided to employ Mr. Cavana, land surveyor of Orillia, by your permission, to run the lines on certain streets and lots on the Bailey estate, Port Carling, and he will proceed to do so if you will supply him with correct map and instructions that he may know the points and boundaries of said streets. I have written by this mail to Mr. Cavana to tell him to proceed with the work as soon as he gets the necessary information from your department, by request of the council of said municipality."

This letter says "to run the lines on certain streets and lots on the Bailey estate," but no streets were pointed out; and it is clear to my mind that there was no intention to make, and no necessity for, a re-survey of the whole of the plot known as "the Bailey estate."

The assistant commissioner of crown lands, however, on the 31st January, 1898, wrote to the clerk :—"Referring to the petition, etc., etc., dated September, 1897, I have to inform you that instructions have been this day issued to Ontario Land Surveyor Allan G. Cavana, of Orillia, to make the required survey." The letter of instructions has not been produced, but I gather from a letter of the 26th June, 1899, signed by the commissioner of crown lands, and directed to the clerk of the municipality, that such instructions were "to survey the village lots of the Bailey estate, in the town plot of Port Carling, and to plant durable monuments at the front angles of each of these lots, on Joseph street, Bailey street, and a street south of Bailey street, unnamed in the original survey of said town plot of Port Carling."

Whatever may be the effect of these instructions, and they apparently having been acted upon, I, with great respect, am of opinion that there was not sufficient material sent by the defendants' council to warrant such a general re-survey being ordered. The evidence shews that the disputes arose in regard to the line and proper course of this part of Bailey street running from Joseph street to the Indian River, on which were

the lots owned by Robert Bailey and the plaintiff Harris. On the information contained in the resolution of the municipal council, and in the letter written by virtue thereof to the Lieutenant-Governor in council, everthing was open, except that there were disputes, "as to entire streets and lots." These streets, etc., should have been designated by the corporation in their application to the Government, and until that was settled the corporation should not have allowed the matter to remain open, so as to have the survey authorized by the commissioner of crown lands. In my judgment, the statute has not, therefore, been complied with. No range, or block, or part of a range or block, has been designated as requiring the survey, etc., to be made, in order to set at rest the alleged disputes alluded to; neither in the resolution directing the letter to be written, nor in the letter presumably written in obedience to it, are any such particulars given. "The village lots on the portion known as 'the Bailey estate,' composed of about 114 lots," is all that is stated. Now "the Bailey estate survey" appears to be a part of the town plot which lies between the Indian River on the south and the line dividing lots 32 and 33 in the 3rd concession of the township, bounded on the north by Lake Rosseau and the canal which joins navigation with that lake and the river. So that it is a separate part of the village of Port Carling, and is divided into blocks or ranges, by Joseph street, running from the river at the north from the canal southerly to the corner of lot 49, thence south-easterly across a street which has no name, into "Foreman's Bay" on the said river. And by a cross street, called "Bailey street," which runs from the Indian River, between lots 66 and 67, north-easterly to the aforesaid limits, between township lots 32 and 33 aforesaid. There is also another cross street without a name, running from Indian River between lots 84 and 85, parallel to Bailey street, to Silver Lake; also, another street running from Joseph street between lot 89 and a small angle of land, called "Silver street." This part of the town plot, known as "the Bailey estate survey," is further sub-divided into 76 lots of various sizes, and being numbered consecutively from and inclusive of 39 to 114; a great number of which are small lots containing 1 acre each; there are others which contain 2 acres each, and larger lots

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which contain from 4 to 18 acres each. And it appears that the surveyor has made a re-survey of the whole of this plot, and placed at the front angles of every one of these 76 lots, a stone or other durable monument.

I find, on the evidence, that the only serious dispute which existed with reference to the survey originally made of this plot, was as to the course of that part of Bailey street which extends from Joseph street south-westerly to the Indian River; on which lots 63, 64, and 65 on the westerly side belonged to Robert Bailey (the councillor who set the matter in motion, by moving the resolution of the 4th September, 1897), and the plaintiff Harris, who owned Nos. 67, 68, 69, 70, 71, and part of 72, on the opposite side of the street; and this, I find, was brought about by Bailey and one Matthew McDermott, who owns lot 62, placing the fences in the front of their lots over on to the street allowance, according to a survey made by Wm. Galbraith, an Ontario land surveyor, at the instance of the plaintiff Harris. So that, for all that appears, the whole difficulty could have been got over by the surveyor Cavana establishing the proper line of Bailey street, from Joseph street to the Indian River, the cost of which, according to the evidence, would not have exceeded \$40 or \$50, and, if such a state of things could be construed as coming within the purview of the statute invoked, such cost would have been chargeable only against the owners of the lots interested, on that part of Bailey street on which the lots affected are situate.

I find that no one of the plaintiffs, except Harris, was interested in this survey. It was proven to my satisfaction that there was no dispute or difficulty as to the respective boundaries of their lots, all of which contain the greater number of acres, and for which they are assessed to pay for a survey, and the placing of monuments, which were in no way necessary to the finding or fixing of their respective boundaries. So that the plaintiffs are assessed to pay \$2.13 per acre for every lot they happen to own in "the Bailey estate survey," whether the re-survey was required, or in any way beneficial to them, or not; while the persons who were and are benefitted, and whose lots contained about 2 acres each and less, have the survey at the expense of those who are not benefitted, etc.



I do not think that such is the intention of the Act. In the case of townships, the statute directs that the expense of surveying and placing monuments of each concession is to be borne by the proprietors of land there; in the case of villages, it is the proprietors of the range, or block, or part of a range or block, which is affected, not the whole of the village, or any particular survey of a part of such village, whether affected or not. The fact is that the council of the municipality did not apparently know what they wanted, or at least what they were entitled to apply for under the Act.

I think this case comes within the principles laid down by the Court of Common Pleas in *In re Scott and County of Peterborough* (1866), 26 U.C.R. 36. Hagarty, J., after pointing out the effect of several of the sections applicable, and that the survey, etc., is to be made "at the cost of the proprietors of the lands in each concession or part of a concession interested," goes on to say (p. 38): "In framing these sections it would certainly seem that no general survey of an entire township was contemplated by the Legislature. . . . But the difficulty at once arises that in the re-surveying of the whole township, as here, the cost of the whole in one sum is required from the land-owners in proportion to the quantity of land in the township respectively held by them, whereas the statute throws the burden of the survey in each concession or part of a concession on them in proportion to the quantity of land held by them respectively in such concessions or parts of a concession. The county council can have no right to place the burden otherwise than as the statute seems expressly to direct. Each concession should bear the cost of its re-survey. This by-law throws it on the township generally. If in concession No. 1, there were fifty land-holders, each owning 100 acres, the cost of its survey could be easily apportioned among them. If concession No. 4 had only thirty land-holders, the same process could be applied. Practically it might be much more costly to run the lines of one than of the other, from the extent of the obliteration. But if the aggregate cost of both surveys be directed to be levied of all the land-holders in the two concessions according to the quantity held by each in them, the burden would not be borne

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as the law directs. A man owning 100 acres in concession 1 might own 500 in concession 4," etc.

And Draper, C.J., at p. 40: "Where the Legislature have seen fit to direct that the expense of a re-survey of each concession shall be borne by the owners of land in that concession, though every concession in that township has been re-surveyed, the expense of each belongs to the land-holders of each, and the whole is not to be levied on all the proprietors of the township."

Now that applies to this case. "Concession" in that case is equivalent to "range" or "street" in the case of a town or village. The lots are in a range, or block, facing on a street; and when, for example, lot No. 4 in the 4th concession of a township is referred to, it means a lot which fronts on a street, roadway, or allowance for a road, between concessions of lots; in the same sense as a street is a road allowance on which the land on either side is sub-divided into lots, or blocks. Take, for instance, that part of Joseph street from the north end down to Bailey street. There are 33 small lots, all of which, except 5, are about one chain in width; the whole distance being about 20 chains. Then there are only 16 lots from Bailey to the southerly end of Joseph street, a distance of nearly 40 chains. Now the 33 small lots contain altogether about 16 acres; whereas the 16 larger lots contain about 40 acres. Then Bailey street, from Joseph street southwesterly to the Indian River, is about 21 chains, on which are 16 lots, 14 of which have a frontage of 2 chains and 87 links; and it is here that Robert Bailey, the councillor, is interested. Then in that part of Bailey street which extends from Joseph street north-easterly to the limits of the village, a distance of about 26 chains, there are only 4 lots which are taxed; containing altogether about 42 acres. Then there is lot No. 85 fronting on the unnamed street, and not as stated in the by-law, on Silver street; with a frontage of 10 chains, 52 links, containing at least 10 acres. There are also lots 81, 82, 83, 84, and part of 80, belonging to the plaintiff Massey, containing 15 acres. These lots are on the unnamed street, and no dispute or uncertainty existed as to them or either of their respective boundaries. So that the cost of the whole survey, etc., is being thrown on the proprietors of what is known as "the Bailey

estate survey," instead of on the proprietors of the lands in each block or range or part of block or range interested. A glance at the map prepared by the surveyor will shew how unjust and inequitable such a state of things is.

Taking the whole of the facts connected with the case, I am of opinion that the survey directed was not authorized; the requirements of the statute not having been complied with, so as to give the Lieutenant-Governor in council jurisdiction to authorize the survey. 2. That there being no jurisdiction to authorize the re-survey, the re-survey itself was illegal. 3. The re-survey being illegal, the municipal council had no power to pass a by-law with the avowed purpose of levying the cost of such re-survey. 4. That, if there was jurisdiction to authorize the re-survey, it could only be at the cost of the proprietors of the lands in each range or block or part of each range or block interested; and not, as has been done by this by-law, of all the proprietors, whether interested or not.

I also find that sub-sec. 5 of sec. 38, requiring an estimate of the sum requisite to defray the expenses to be incurred, was not complied with by the council before they applied to the Lieutenant-Governor; in fact, on the evidence of the town clerk and the reeve, the question of expense was not considered at all. No one of the members seemed to know how the cost of the survey was to be provided for, until a letter from the commissioner of crown lands informed them that the work would be done at the cost of the municipality; and the recital in the by-law in regard to the estimate is not correct. I also find that lot 98 never belonged to the Bailey estate, but whether it was in what is known as "the Bailey estate survey," I am not able to state; but I find as a fact, in this connection, that the by-law is wrong in levying any cost of the re-survey on the plaintiff Shannon, as lot No. 98 never did, and does not now, belong to him, but to his wife.

In considering the questions involved, I have not overlooked the reference by defendants' counsel to the case of *Regina v. McGregor* (1868), 19 C.P. 69; but that case is distinguishable. There there were the petition and the memorial, and, between the two, it was clear that the council memorialized the Governor for a survey of the 1st concession of the township, under the

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Act, and that the placing of the monuments was an incident to the survey, necessarily involved in the application of the survey; whereas, in the case now *sub judice*, neither of the resolutions passed by the council, nor the letter written by the clerk, particularized the street, range, or block, or the part of the street, range, or block, which it was requested should be re-surveyed. The letter of the assistant commissioner of crown lands of the 13th October, 1897, suggests to the clerk that the survey wanted is that of several streets, etc., naming them; but says: "If this be so, let us know at once," etc. The clerk, however, is not directed by the council to answer that, nor to say what streets are to be surveyed. But, on the 10th January following, writes to say: "The council have decided to employ Mr. Cavana to run the lines on certain streets and lots on the Bailey estate, Port Carling." Clearly intimating that it was not the whole of the Bailey estate that was to be re-surveyed. In my judgment, the statute requires the municipal council to state, with particularity, for what range, block, or parts of range or block, the re-survey is requisite, and not leave it at large for the commissioner of crown lands to order and direct whatever he may suppose is intended. The council is required to be specific, and it is not until they are so that the statute authorizes the appointment of a surveyor to do the work. Nor do the defendants in their statement of defence, para. 1, assert that the council of the village adopted a resolution in regard to any specific lots, but "to place durable monuments at the front or rear angles of certain lots in the village of Port Carling;" without stating where the "certain lots" are situated.

The real question in the case is: did the municipal council comply with the Act in its application, by stating that it is desirable to have a re-survey, and of consequence to place monuments, etc., at the angles of any particular lots in any range or block, or parts of a range or block, in their incorporated village? In my judgment, they have not done so; they left the question at large; and the commissioner of crown lands authorized a re-survey of the whole of "the Bailey estate survey" of the village of Port Carling; which was not necessary, and involved the plaintiffs, and other owners of lots in that part of the village, in a large and unnecessary expense.



And, to adopt the language of the Chief Justice in *In re Scott and Peterborough*, before referred to, "The powers to tax, confided to the councils of municipalities, can only be exercised in the manner specified by the Act. And when the Legislature have seen fit to direct that the expense of a re-survey of each concession shall be borne by the owners of land in that concession; though every concession in that township has been re-surveyed, the expense of each belongs to the land-holders of each, and the whole is not to be levied on all the proprietors in the township." Which, being applied to this case, means the land-holders of each street, block, or part of street or block, which required to be re-surveyed, and not the whole of the proprietors in "the Bailey estate survey," whether they were interested or not.

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I refer also to *Cooper v. Wellbanks* (1864), 14 C.P. 364, as authority for holding that the statute must be complied with to authorize the Government to cause the survey to be made by the instructions of the commissioner of crown lands.

On the whole casé I find all the issues material to be considered and urged before me, in favour of the plaintiffs; and I am of opinion that the assessment under the said by-law upon the plaintiffs is illegal and void; that the by-law should be quashed, the injunction made perpetual, and that the defendants' corporation should pay the costs of the action, together with the costs of, and incident to, the injunction, on the higher scale.

As to the defendant Martin, at the trial I expressed the opinion that there was no necessity for making him a defendant, as he was and is a servant of the defendants' corporation, and I now dismiss the action as against him, without costs.

T. T. R.

## [DIVISIONAL COURT.]

RE DOOLITTLE V. ELECTRICAL MAINTENANCE AND  
CONSTRUCTION Co.

1901

Dec. 23.

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March 12.

*Division Courts—Territorial Jurisdiction—Cause of Action—Flooding Land—  
Erection of Dam—Prohibition.*

In a division court action the plaintiff's claim was for damages for injuries caused to his lands, which were situate within the limits of the division in the court of which his action was entered, by reason of their having been overflowed and his crops damaged by waters alleged to have been unlawfully brought by the defendants to and cast upon his lands. The backing of the water was alleged to have been caused by a dam which the defendants had erected on their own lands, situate beyond the limits of such court:—

*Held*, that the erection of the dam was part of the cause of action, and therefore the whole cause of action did not arise within the jurisdiction of the division court in which the action was brought; and prohibition was ordered.

MOTION by the defendants to prohibit further proceedings in an action in the 2nd division court in the district of Muskoka. The facts are stated in the judgments.

The motion was heard by MEREDITH, C.J.C.P., in Chambers, on the 29th November, 1901.

*R. D. Gunn*, for the defendants.

*F. G. Evans*, for the plaintiff.

December 23. MEREDITH, C.J.:—The plaintiff's claim is for damages for injuries caused to his lands, which are situate within the limits of the division in the court of which his action was entered, by reason of their having been overflowed and his crops damaged and destroyed by waters alleged to have been unlawfully brought by the defendants to, and cast upon, his lands.

The backing of the water is alleged to have been caused by a dam which the defendants had erected on their own lands and is situate beyond the limits of the second division.

The defendants object that the whole cause of action which the plaintiff alleges did not arise within the limits of the second division, and that there was, therefore, no jurisdiction in the court of that division to try the action.

The contention of the defendants' counsel on the argument was, that the existence of the dam, the maintenance of it by the defendants, and injury to the plaintiff, by the flooding by means of it of his lands, were all facts necessary to be proved by the plaintiff to entitle him to recover, and that the whole cause of action did not, therefore, arise within the limits of the second division, in which case alone the plaintiff was entitled to sue in that court, the residence and place of business of the defendants being without the limits of that division: Division Courts Act, R.S.O. 1897, ch. 60, sec. 84.

Counsel for the defendants relied on the definition of "cause of action" given by Lord Esher, then Mr. Justice Brett, in *Cooke v. Gill* (1873), L.R. 8 C.P. 107, at p. 116, which he there says is the meaning it has had from the earliest time, and is: "Every fact which is material to be proved to entitle the plaintiff to succeed,—every fact which the defendant would have a right to traverse."

That definition the same learned Judge reaffirmed in *Read v. Brown* (1888), 22 Q.B.D. 128, at p. 131.

The argument of the learned counsel, as it appears to me, failed to recognize and give effect to the distinction which the Master of the Rolls, at p. 131, pointed out between a fact to be proved and the evidence which is necessary to prove a fact, saying: "It" (*i.e.*, a cause of action arising in the city) "does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

What then is the application of the definition thus explained to this case? The wrong of which the plaintiff complains is the flooding of his lands, and that act was done within the four corners of his lands, it is immaterial by what means, if done by the defendants and if the act was unlawful.

In order to prove that it was the act of the defendants which caused the injury it became necessary to shew that the backing of the water was due to the maintenance by the defendants of their dam, but this is only the evidence by which the fact necessary to be proved is established, the fact necessary to be proved being, as I have said, that the waters which came upon the plaintiff's lands came there by the act of the defen-

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dants, and is not, therefore, part of the cause of the action, within the meaning of Lord Esher's definition.

The defendants' motion, therefore, fails, and must be dismissed with costs.

The defendants appealed from this decision, and their appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ., on the 20th January, 1902.

*F. A. Anglin* and *R. D. Gunn*, for the defendants. The erection of the dam in question was authorized by 62 Vict. ch. 64, sec. 1 (O.) The plaintiff has no cause of action unless he can shew negligence in the erection, construction, or maintenance of the dam. That is certainly part of his cause of action. We refer, in addition to the cases cited by the learned Chief Justice, to *Re Watt v. Van Every* (1863), 23 U.C.R. 196; *Borthwick v. Walton* (1855), 15 C.B. 501; *Oatman v. Michigan Central R.W. Co.* (1901), 1 O.L.R. 145; *Langstaff v. McRae* (1892), 22 O.R. 78. The judgment awards future damages, which are not within the jurisdiction of the Court: sec. 98 of the Division Courts Act, R.S.O. 1897, ch. 60.

*F. G. Evans*, for the plaintiff. I am not called upon to contend that the dam caused the flooding. The plaintiff shewed the erection of the dam, but did not say the dam caused the damage. He says the flooding caused the damage. I rely on the reasons of the learned Chief Justice.

March 12. STREET, J.:—The action is brought to recover damages for the flooding of the plaintiff's land by reason of a dam erected by the defendants. The plaintiff's land is situated wholly in the limits of the 2nd division court; the dam erected by the defendants is outside these limits; and the residence and place of business of the defendants is not within the limits of the 2nd division court. The prohibition was asked upon the ground that the action was not maintainable in the 2nd division court because the whole cause of action did not arise therein, nor did the defendants reside therein.

With great respect, I find myself unable to agree in the judgment appealed from.

In order to sustain the jurisdiction of the 2nd division court of Muskoka, in which the action is brought, it is necessary



to shew that the whole cause of action arose within its limits.

“‘Cause of action’ has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed,—every fact which the defendant would have a right to traverse:” *Cooke v. Gill*, L.R. 8 C.P. at p. 116.

To entitle the plaintiff to succeed in the present case, he must prove, first, that he has sustained damage, and second, that the damage sustained is due to the wrongful act of the defendants. Both of these are material to be proved, and a failure to prove either of them would result in a dismissal of the action; and, therefore, both are within the admitted definition of his cause of action.

The wrongful act of the defendants was the erection of their dam upon their own land to such a height as to cause the water of the stream to back upon the plaintiff’s land. The erection of the dam was the act of the defendants, and the damage to the plaintiff was consequential from that act. They were at liberty to build any erection they chose upon their own land, so long as no injury was caused to others, but so soon as their dam became the cause of injury to the plaintiff, its maintenance became wrongful, and might be restrained by injunction, and its consequences gave the plaintiff a right of action.

In all the cases to which I have referred of a similar character, the plaintiff in his pleading has always set forth, not only his damage, but the manner in which the defendant was charged with having caused it; and it is clear that the defendants would have the right to traverse the statement that the damage complained of was caused by his dam. The example of a statement of claim in a similar case given in Bullen & Leake’s Precedents, 2nd ed., p. 367 (5th ed., p. 539), sets out the fact that the defendant penned back the water of the river, and thereby flooded the plaintiff’s land; and this would, of course, be traversable.

In support of this reasoning, numerous cases in both the English and American Courts are to be found in which it is held that where the land injured by a dam is in one county or state, and the dam itself is situate in another, the action will lie in either: *Leveridge v. Hoskins* (1710), 11 Mod. 257,

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decided in Mich. Term, 8 Anne; *Bulwer's Case* (1587), 4 Coke's Rep., p. 49, decided in Mich. Term, 29 Eliz.; *Sutton v. Clarke* (1815), 6 Taunt. 29; *Wells v. Ody* (1836), 1 M. & W. 452, per Lord Abinger.

The question is very fully discussed in *Foot v. Edwards* (1855), 3 Blatch. (Conn.) Cir. Ct. R. 310, and in Gould on Waters, 3rd ed., pp. 720-1.

In my opinion, we must hold that part of the cause of action arose outside the limits of the 2nd division court, Muskoka, and the order for prohibition should go, with costs of the motion and appeal to be paid by the plaintiff to the defendants.

FALCONBRIDGE, C.J.:—In this case two elements combine to make the cause of action, if the plaintiff has one: (1) a wrongful act committed by the defendants; (2) damage to the plaintiff by reason thereof.

Neither of these facts, of itself, constitutes a cause of action against the defendants.

The wrongful penning back by the defendants of the water, by the erection of a dam, in a place beyond the limits of the 2nd division court of Muskoka, and the damage which the plaintiff has sustained within these limits, together make the cause of action.

The proof of the one is as essential to the plaintiff's right to recover as the proof of the other.

With great deference, I think that the proof of the commission of the act of building the dam is not a mere piece of evidence to prove a fact, but it is the very fact which it is material to prove in order to entitle the plaintiff to succeed, and without proof of which he cannot succeed, although his land may have been damaged.

I think, therefore, the definition of "cause of action" given in *Cooke v. Gill*, L.R. 8 C.P. at p. 116, and *Read v. Brown*, 22 Q.B.D. at p. 131, covers this case exactly.

The appeal must be allowed, and prohibition ordered, with costs here and below.

BRITTON, J., concurred.

E. B. B.

[STREET, J.]

## CITY OF TORONTO V. BELL TELEPHONE CO. OF CANADA.

1902

March 10.

*Constitutional Law—Incorporation of Companies—Dominion Objects—Interference with Property and Civil Rights in Province—Telephone Company—Right to Carry Poles and Wires Along and Across Streets—Consent of Municipalities—Dominion and Provincial Acts—Construction—Inconsistent Provisions.*

1. Under the British North America Act, the power of the Canadian Parliament extends to the granting of charters of incorporation to companies, with Canadian, as distinguished from Provincial, objects, and to declaring the objects of their incorporation; but, except in the case of companies incorporated for carrying into effect some of the heads mentioned in sec. 91, the mere fact of a Canadian incorporation does not carry with it the right of interfering with property and civil rights in the different Provinces, in any way, no matter how strongly the objects of incorporation may seem to require such interference; and, in order that such companies may entitle themselves to do so, it is necessary that they obtain the authority of Provincial legislation.

2. While the defendants were duly and properly incorporated under their special Act, 43 Vict. ch. 67 (D.), they did not by that Act obtain the power of interfering in any Province with the property or rights of persons or incorporations, and could not do so until authorized by an Act of the Provincial Legislature.

3. The defendants, being desirous of exercising their powers within the Province of Ontario, petitioned the Legislature of that Province to confirm the powers which their Dominion Act of incorporation purported to confer upon them, and especially the power of carrying their poles and wires along, across, and under the streets and highways in the Province, and thereupon the Act 45 Vict. ch. 71 (O.) was passed, authorizing them to exercise within the Province the powers in the Act mentioned. Two months later, upon the defendants' petition, the Act 45 Vict. ch. 95 (D.) was passed, amending their Act of incorporation in certain particulars, and declaring that the Act of incorporation as amended and the works thereunder authorized were for the general advantage of Canada:—

*Held*, that from this time forward the defendants were subject to the exclusive jurisdiction of the Dominion Parliament, but the Provincial Act was not thereby repealed, as the Dominion Act had not expressly declared that the provisions of the Ontario Act were no longer binding; and the defendants were still entitled to all the rights and subject to all the restrictions contained in the Ontario Act not abrogated by absolutely inconsistent provisions in the Act of incorporation.

4. By the defendants' Dominion Act they were given a general power to erect and maintain their lines upon, under, and across all streets and highways, qualified by the condition that the location of the lines and the opening up of the streets was to be done under the direction of an officer appointed by the municipal council, and in such manner as the council might direct, and that in certain specified cases the consent of the council must first be obtained. By the Provincial Act similar powers were given, with one important qualification, "that in cities, towns, and incorporated villages, the company shall not erect any pole higher than 40 feet above the surface of the street, nor affix any wire less than 22 feet above the surface of the street, nor carry any such poles or wires along any street without the consent of the municipal council:—"

*Held*, that the effect of this latter provision was to forbid the defendants carrying any poles or wires at all along any street without the consent of the council.

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5. The Ontario Act, in so far as it was not consistent with the Dominion Act, must not be taken to be repealed by the latter; the Ontario Act should be treated as conferring special rights upon the defendants in regard to their works in that Province, and at the same time subjecting them to the necessity of obtaining the consent of the local municipalities to the use of the streets, while leaving to their Act of incorporation its full operation in other Provinces.
6. Therefore, the defendants had no right to carry any poles or wires (either above or under ground) along any street in the city of Toronto, without first obtaining the consent of the municipal council; but, inasmuch as the Ontario Act does not make their power to carry wires *across* streets dependent upon the consent of the council, they may carry them across the streets, either above or under ground, subject in the latter case to the direction of the council and its engineer or other officer as to the location of the line and the manner in which the work is to be done, unless such direction shall not be given within one week after notice in writing, and subject to the other provisions of the Act of incorporation.

#### SPECIAL CASE.

1. On the 29th April, 1880, the Parliament of Canada enacted a statute intituled "An Act to incorporate the Bell Telephone Company of Canada:" 43 Vict. ch. 67.

2. On the 10th March, 1882, the Ontario Legislature enacted a statute intituled "An Act to confer certain powers upon the Bell Telephone Company of Canada:" 45 Vict. ch. 71.

3. On the 17th May, 1882, the Parliament of Canada enacted a statute intituled "An Act to amend the Act incorporating the Bell Telephone Company of Canada:" 45 Vict. ch 95.

4. The company carries on a long distance telephone business and a local telephone business in various places in the Dominion, including the city of Toronto, operated by means of lines of telephone, as hereinafter defined. The local business consists of furnishing communication between persons using telephones in a city, town, or other place where a central exchange exists. There are central exchanges to which run both the local lines and the long distance lines. Any person in Toronto may use the long distance lines for the purpose of speaking to a person outside of Toronto by going to a central exchange and paying the usual charge therefor, and any telephone subscriber in Toronto desiring to speak to a person outside of Toronto may use the long distance lines for the purpose, by having connection made with them through the central exchange and paying such usual charge. In doing this he would use his own instrument and line to the central exchange, and the long distance line from there. The long distance lines are not used in the local business. A line or lines



of telephone consist of poles with wires affixed thereto or of conduits with wires carried through the same.

5. The defendants contend that, under and by virtue of the statutes above mentioned, except as to any pole higher than forty feet above the surface of the street or any wire to be affixed less than twenty-two feet above the surface of the street, they have the right to construct, erect, and maintain their line or lines of telephone along the sides of or under any public highways, streets, bridges, or watercourses in the city of Toronto; that the consent of the city is not essential to the exercise of that right; and that if, after notice in writing to the city of the intention to construct, erect, and maintain such lines, the engineer or other officer appointed by the council, or the council, omits to give reasonable directions as to the location of the line or lines and the opening up of the streets for the erection of poles or for carrying the wires underground, and to supervise the work, the defendants may lawfully proceed with the work or may procure a mandamus or order of the Court to compel the engineer or other officer or the council to give such directions.

6. The plaintiffs contend that the defendants have no right to construct, erect, and maintain their line or lines of telephone along the sides of or under any public highways, etc., without first obtaining the consent of the municipal council, which consent the council may withhold; and if the council fails to consent, the defendants cannot exercise such powers within the city.

7. The plaintiffs further contend that, in any event, the defendants have no right to construct, erect, and maintain a line or lines of telephone along the sides of or under any public highways, etc., to carry on a local telephone business in the city without first obtaining the consent of the municipal council.

8. The plaintiffs further contend that the statutes of the Parliament of Canada above referred to do not confer upon the defendants the powers contended for by the company; but if they purport to confer such powers, they are to that extent *ultra vires*.

9. The plaintiffs further contend that, in any event, the line or lines of telephone can only be carried along the sides of or

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under any public highways, etc., subject to the control of such highways, etc., by the corporation, and subject to provisions for the protection of the public thereon, and in conformity with such terms, conditions, and regulations as the municipality may from time to time enact or prescribe.

10. On the facts stated, the Court is asked to declare the rights of the plaintiffs and defendants in regard to the various contentions above stated.

The special case was heard by STREET, J., in the Weekly Court, on the 26th February, 1902.

*C. Robinson*, K.C., and *J. S. Fullerton*, K.C., for the plaintiffs. The amending statute 45 Vict. ch. 95 was passed in consequence of the decision in *Regina v. Mohr* (1881), 2 Cart. 257, 7 Q.L.R. 183. The amending Act declared the works of the company to be for the general advantage of Canada. The Ontario Act was also, doubtless, passed in consequence of that decision. As to the powers of the Provincial Legislature in an analogous matter, see *City of Montreal v. Standard Light and Power Co.*, [1897] A.C. 527. It is not worth while to contend that the Dominion Parliament could not give power to interfere with highways for the purpose of carrying out a proper Dominion purpose, in view of *Tennant v. Union Bank of Canada*, [1894] A.C. 31. What we contend is, that where the Dominion Parliament purports to give such power, it must be in the plainest words, and we ask the Court to say whether the company has the absolute right to say on what streets it will place its lines, and then simply call on the plaintiffs to approve. We make a distinction between their "through" business and their local business. If the power to connect their local lines with their "through" lines is given, it must be by express words. Telephones are not under the general jurisdiction of the Dominion as a special subject. Works for the general advantage of Canada are. But does the incorporation of a company for the purpose of connecting the various Provinces, without more specific powers, authorize such company to run their lines along any street, without the consent of the municipality? The municipality are to direct the location, that is we say, to name the street or streets. If it were telegraph

lines, it would require stronger language than we have here to give the telegraph company power to connect every house in a city with the long distance lines. So far as "through" lines are concerned, there is express authority to construct them; but the Ontario Act contains a direct prohibition against the erection of poles without the consent of the municipality: *Bell Telephone Co. v. Belleville Electric Light Co.* (1886), 12 O.R. 571.

*W. Cassels, K.C., G. Lynch-Staunton, K.C., and S. G. Wood,* for the defendants. Once a local wire is connected with a long distance wire, it becomes part of the "through" system. But, apart from that, the Dominion Parliament has, as conceded, the power to allow the company to go upon the streets, and it has clearly exercised it. The local Act does not differ from the Dominion Act, and if it did, it would be void. In the analogous case of *Grand Trunk R.W. Co. v. Washington*, [1899] A.C. 275, it was held that the word "such" related to the immediately preceding words, and not to the whole section. So in sec. 3 of the Ontario Act, "such" surely relates to the kind of poles mentioned immediately before. The object is to confirm the rights the company already have: see the preamble. If the Ontario Act were to be construed as contended for, it would be *ultra vires*: *Canadian Pacific R.W. Co. v. Notre-Dame*, [1899] A.C. 367; *Madden v. Nelson and Fort Sheppard R.W. Co.*, *ib.* 626. As to the powers of the Dominion Parliament, see *Canada Atlantic R.W. Co. v. City of Ottawa* (1901), 2 O.L.R. 336. The Dominion Act gives power as to location of lines, but not to prevent their being located at all. This point was not up at all in the case in 12 O.R.; and the case of *Atkinson v. City of Chatham* (1898), 29 O.R. 518, (1899), 26 A.R. 521, (1900), 31 S.C.R. 61, and *Bonn v. Bell Telephone Co.* (1899), 30 O.R. 696, are not upon the point, though there may be dicta in them which have a bearing. The words "location of line or lines" inserted by the statute of 1882 do not give the corporation any more control than the original statute over the use of streets by the company.

*Robinson*, in reply. It is true that *Atkinson v. City of Chatham* is not directly upon the point, but Maclellan, J.A., 26 A.R. at p. 523, does construe the Act in the way we contend

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for, and I do not find any dictum the other way. *Bonn v. Bell Telephone Co.*, 30 O.R. at p. 702, may also be referred to. The powers given by R.S.O. ch. 223, sec. 559 (4), to pass by-laws for regulating the erection and maintenance of electric light, telegraph, and telephone poles and wires within the municipality, was introduced in 1881, and was, therefore, there when the Act of 1882 was passed. The power contended for by the company is not given in express words, is not necessary for the incorporation of the company, and is an improper power to bestow.

March 10. STREET, J.:—As I understand and interpret the provisions of the British North America Act and the decisions upon it, the power of the Canadian Parliament extends to the granting of charters of incorporation to companies with Canadian, as distinguished from Provincial, objects, and to declaring the objects of their incorporation; but, except in the case of companies incorporated for carrying into effect some of the heads mentioned in sec. 91, the mere fact of a Canadian incorporation does not carry with it the right of interfering with property and civil rights in the different Provinces, in any way, no matter how strongly the objects of incorporation may seem to require such interference. In order that such companies may entitle themselves to do so, it is necessary that they obtain the authority of Provincial legislation.

Certain classes of works and undertakings mentioned in the 10th sub-section of sec. 92 of the British North America Act are, however, taken away from the Provincial jurisdiction and brought within the exclusive jurisdiction of the Canadian Parliament; either, 1st, when they connect one Province with another or extend beyond the limits of one Province; or, 2nd, when they are declared to be for the general benefit of Canada or of two or more of its Provinces. In the construction of this 10th sub-section there is room for some divergence of opinion. Is the Provincial Legislature ousted of its jurisdiction by the mere passing of an Act by the Dominion Parliament authorizing the construction of a work which when completed will connect the Provinces? Or must the connection by means of the works authorized actually take place in order that the Dominion



Parliament may obtain exclusive legislative control? If it should be necessary to determine this question for the purposes of the present case, I should be prepared to hold that the proper construction of the Act requires the adoption of the latter of these two views. It appears to me that the connection between the two Provinces required by clause (a) of sub-sec. 10 is a real and physical one, and not a mere paper one created by a charter, the works under which may never extend to the limits of the single Province in which they are begun, or may never be begun at all. The word "undertakings" would be satisfied by the actual operation of a line of steamships, leaving the word "works" to apply to the other objects mentioned or referred to in the section. And it is to be borne in mind that any inconveniences which might otherwise arise under this construction could always be avoided by a declaration in a Dominion charter that the works contemplated by it were for the general benefit of Canada: *Regina v. Mohr*, 7 Q.L.R. 183; *Citizens Ins. Co. v. Parsons* (1881), 7 App. Cas. 96; *Colonial Building and Investment Association v. Attorney-General of Quebec* (1883), 9 App. Cas. 157; *Tennant v. Union Bank*, [1894] A.C. at p. 45.

In the present case it does not appear, perhaps, necessary to insist upon this view of the effect of the British North America Act to its full extent, because the Act of incorporation of the defendant company, while authorizing them to carry on the business of a telephone company anywhere in Canada, does not in express terms require, although it certainly authorizes, a connection, by means of their lines, of two or more Provinces; the objects of their incorporation as expressed in the Act might have been served without such connection.

It appears to me to be necessary thus to consider and determine the status of the defendants upon their incorporation by their Dominion Act, 43 Vict. ch. 67, in order to decide whether the Ontario Legislature had the power to alter the defendants' powers under it so far as its operations were carried on in this Province. They would clearly not have that power if the Dominion Legislature had in the first place declared their work to be for the general benefit of Canada, for I am of opinion that the objects of the charter are within the classes referred

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to in paragraph (a) of sub-sec. 10 of sec. 92. Nor would they have that power if it were to be held that a mere charter connection were sufficient, without an actual physical connection, to exclude the jurisdiction of the Provincial Legislature, and that such a charter connection had been created by the terms of the defendants' Act of incorporation.

It follows necessarily from the views I have expressed as to the true construction of the sections of the British North America Act to which I have referred, and from my view of the interpretation of the language used in declaring the objects of the defendant company in their Act of incorporation, that, while the defendants were duly and properly incorporated under their special Act, being the statute of the Dominion Parliament 43 Vict. ch. 67, they did not by that Act obtain the power of interfering in any Province with the property or rights of persons or corporations until authorized to do so by an Act of the local Legislature.

Accordingly, being desirous of exercising their powers within the Province of Ontario, they petitioned the Legislature of that Province to confirm the powers which their Dominion Act of incorporation purported to confer upon them, and especially the power of carrying their poles and wires along, across, and under the streets and highways in the Province. Thereupon, on the 10th March, 1882, the Legislature of Ontario passed an Act, 45 Vict. ch. 71, authorizing them to exercise within the Province the powers in the Act mentioned.

It is to be observed that neither in the recital to this Act, nor in the special case submitted in the present action, is it alleged that the works of the defendants connected the Province of Ontario with any other Province of the Dominion, or extended beyond the limits of this Province, at the time the Act was passed.

On the 17th May, 1882, being a little more than two months later, the Dominion Parliament, upon the defendants' petition, passed the Act 45 Vict. ch. 95, amending their Act of incorporation in certain respects, and declaring that the "Act of incorporation as hereby amended and the works thereunder authorized are hereby declared to be for the general advantage of Canada."

There is no doubt that from this time forward the defendants became subject to the exclusive jurisdiction of the Parliament of the Dominion, but, in view of the somewhat different powers with regard to interference with streets and highways conferred upon them by the Ontario Act and by their Dominion Act of incorporation, it is necessary, for the purposes of the present case, to determine the effect, if any, upon the Ontario Act above referred to of the Dominion Act which brought them under the exclusive legislative authority of the Dominion. It is to be observed that the British North America Act, sec. 92, sub-sec. 10, cl. (c), provides for the declaration that certain *works* are for the general advantage of Canada, and gives to that declaration the effect of withdrawing such *works* from the legislative jurisdiction of the Province; but it gives no effect or meaning to a declaration that any particular Act of a Legislature or of the Dominion is for the general advantage of Canada. There is, therefore, no special effect to be given to that part of the clause above quoted which declares the defendants' Act of incorporation to be for the general advantage of Canada.

The position of the defendants immediately before the passing of the Act which brought them under the jurisdiction of the Parliament of Canada was this: they had a corporate existence by virtue of the Dominion Act 43 Vict. ch. 67, which also declared the purposes for which they were incorporated, and conferred upon them certain powers which they were unable to exercise without the authority of Provincial legislation; that authority they had lately obtained by the Provincial Act of Ontario 45 Vict. ch. 71, which in some respects conferred upon them powers they did not possess under the terms of their Dominion Act (the power, for instance, of proceeding to open up streets without the direction of the municipal engineer in case such direction should be withheld for a week after notice) and in some respects was less favourable to them than the terms of their Dominion Act.

Where a company has been carrying on works in a Province under a Provincial Act of incorporation, if the Dominion Parliament simply declares its works to be for the general

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advantage of Canada without more, the result is, that the company continues to work under the Provincial Acts until they are altered or amended by Dominion legislation; the Provincial Acts are not repealed by the mere fact that the company has come under the jurisdiction of the Dominion Parliament.

I think the Dominion Act 45 Vict. ch. 95 must be treated as a legislative recognition of the defendants' original Act of incorporation, and therefore, in effect, as a practical re-enactment of it. At all events, they are there treated as a corporation, and the 3rd section of their Act, which is the section material to the present case, is amended, and therefore re-enacted with the amendment. But, although it was easily within the power of the Dominion Parliament, upon assuming legislative jurisdiction over the defendants, to have declared the provisions of the Ontario Act no longer binding upon them, they certainly have not in express terms done so; the defendants must, therefore, still be held entitled to all the rights and subject to all the restrictions contained in it which are not found to be abrogated by absolutely inconsistent provisions in the Act of incorporation.

This brings me down to the simple question which the parties desire to have determined upon the present case, which is, whether the defendants are entitled, without the consent of the municipal council of the city of Toronto, to erect their poles and carry their wires along, under, and across the streets of the city, as they claim to be entitled to do, or whether the consent of the council must first be obtained, as the plaintiffs insist.

The effect of the defendants' Dominion Act is as follows: they are authorized to erect and maintain their telephone lines along, across, or under any streets or highways, provided as follows:—

1st. That they do not interfere with the public right of travel and user.

2nd. That in cities, towns, and incorporated villages they shall not erect any poles higher than 40 feet above the surface of the street, nor affix any wire lower than 22 feet above the surface of the street, nor carry more than one line of poles along any street, *without the consent of the municipal council.*

3rd. That where lines of telegraph are already constructed, they shall not in any city, town, or village erect any poles along



the same side of the street where such telegraph has been constructed *without the consent of the municipal council.*

4th. That in cities, towns, and villages the location of the line or lines and the opening up of the streets for the purpose of erecting poles or carrying wires under ground shall be done under the direction and supervision of the engineer or other officer whom the council may appoint *in such manner as the council may direct.*

In this legislation we find a general power given to the company to erect and maintain its lines upon, under, and across all streets and highways, qualified by the condition that the location of the lines and the opening up of the streets is to be done under the direction of an officer appointed by the council, and in such manner as the council may direct; and further qualified in certain specified cases by the condition that the consent of the council must first be obtained.

There is in these powers the obvious defect that the company might find itself seriously hampered in case the council should delay or withhold their direction as to the manner in which the streets might be opened up, etc.

When the defendants went to the Ontario Legislature for assistance, this defect had evidently been considered. The powers conferred by the Act there obtained by the defendants followed those granted by the Canadian Act except in two particulars. The stipulation that the opening up of the streets should be done under the direction of the engineer or officer and in such manner as the council should direct was qualified by the words "unless such engineer, officer, or council, after one week's notice in writing, shall have omitted to make such direction." The other variation introduced by the Ontario Act introduces a still more direct and important qualification of the rights which the Canadian Act had purported to give them, and it is necessary to set forth in full the first portion of the 2nd section of the Act, in order that its effect may be seen.

"The Bell Telephone Company of Canada may construct, erect, and maintain its line or lines of telephone along the sides of, and across or under, any public highways, streets . . . Provided the said company shall not interfere with the public right of travelling on or using such highways, streets . . .

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and provided that in cities, towns, and incorporated villages, the company shall not erect any pole higher than 40 feet above the surface of the street, nor affix any wire less than 22 feet above the surface of the street, *nor carry any such poles or wires along any street without the consent of the municipal council* having jurisdiction over the streets of the said city, town, or incorporated village . . . and provided further that where lines of telegraph are already constructed, no poles shall be erected by the company in any city, town, or incorporated village along the street where such poles are already erected, unless with the consent of the council having jurisdiction over the streets of such city, town, or incorporated village. . . .”

The other provisions of this Act follow those of the Dominion Act of incorporation of the company.

The words “nor carry any such poles or wires along any street,” above underlined, in the Ontario Act, take the place of the words “nor carry more than one line of poles along any street,” in the Dominion Act.

It was argued for the defendants that the words “such poles or wires” must be construed as referring only to poles higher than 40 feet and wires affixed less than 22 feet above the surface of the street, and not as a general prohibition against carrying *any* poles or wires along any street without the consent of the council; and the subsequent provision with regard to streets along which telegraph poles had already been erected was pointed to as sustaining the contention.

In my opinion, the clear intention of the Ontario Act is to forbid the defendants from carrying any poles or wires at all, along any street, without the consent of the council. Had the language in which this prohibition is contained been more ambiguous, the subsequent provision as to streets along which telegraph poles had been erected would not have been without weight, perhaps, in construing it; but I cannot find sufficient ambiguity in the earlier language to justify me in holding it to be controlled by the later.

The next question is, whether the Ontario Act, in so far as it is not consistent with the Dominion Act, must be taken to be repealed by the latter. In my opinion, I ought not so to hold. I think the proper construction of these Acts is to treat the

Ontario Act as conferring special rights upon the defendants in regard to their works in that Province, and at the same time subjecting them to the necessity of obtaining the consent of the local municipalities to the use of the streets, while leaving to their Act of incorporation its full operation in other Provinces. Should this state of things be found unsatisfactory or unworkable, the Canadian Parliament, having declared the defendants' works and objects to be for the general benefit of the whole of Canada, has full power to amend their powers in Ontario, as well as elsewhere.

I need not discuss the subsidiary question, which was argued, as to the possible difference between the rights of the defendants in regard to their local and their "through" lines.

Upon the facts stated, therefore, it should be declared that the defendants have no right to carry any poles or any wires (whether such wires be above or under ground) along any street in the city of Toronto, without first obtaining the consent of the municipal council: but, inasmuch as the Ontario Act does not make their power to carry their wires *across* streets dependent upon the previous consent of the council, they may carry them across the streets either above or under ground, subject in the latter case to the direction of the council and its engineer or other officer as to the location of the line and the manner in which the work is to be done, unless such direction shall not be given within one week after notice in writing, and subject to the other provisions of the Act of incorporation.

I think the defendants must pay the costs, as the plaintiffs have succeeded upon the main questions raised by the case stated.

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CLERGUE V. MCKAY ET AL.

March 7.

April 7.

*Discovery—Production of Documents—Affidavit—Privilege—Confidential Communications—Solicitor and Client.*

Where an affidavit on production of documents claims privilege for a correspondence between a solicitor and his client, it must not only state that the correspondence is confidential and of a professional character, but the nature of it must be set forth, without any ambiguity whatever, in order that there may be no doubt as to its being privileged.

Where the solicitors were acting as agents for the sale of the defendant's land in question in this action shortly before the first of the letters for which the defendant claimed privilege was written :—

*Held*, that the defendant in order to protect the correspondence should give some more definite description of it than that it was written "in reference to the matters which are now in question in this action."

*Gardner v. Irvin* (1878), 4 Ex. D. 49, *O'Shea v. Wood*, [1891] P. 286, and *Ainsworth v. Wilding*, [1900] 2 Ch. 315, followed.

*Hoffman v. Crerar* (1897), 17 P.R. 404, commented on.

AN appeal by the plaintiff from an order of the Master in Chambers dismissing a motion made by the plaintiff for an order requiring the defendant Preston to file a further and better affidavit on production of documents. The decision of the Master upon a previous motion is reported, *ante* 63. The action was for specific performance of an alleged contract for the sale of land by the defendants to the plaintiff. The question upon the appeal was as to the right of the plaintiff to compel the production of certain letters passing between the defendant Preston and a firm of solicitors, for which he, by his affidavit on production, claimed privilege, upon the ground that the letters were confidential communications between him and his solicitors. The facts are stated in the judgment.

The appeal was heard by STREET, J., in Chambers, on the 28th February, 1902.

A. B. Aylesworth, K.C., and R. U. McPherson, for the plaintiff, contended that the firm of solicitors were in fact acting, not as solicitors, but as agents for the sale of the land in question, and that the defendant Preston had not protected the letters by his affidavit.

W. M. Douglas, K.C., for the defendant Preston, contra.



*Hoffman v. Crerar* (1897), 17 P.R. 404, *O'Shea v. Wood*, [1891] P. 286, *Wheeler v. Le Marchant* (1881), 17 Ch.D. 675, and *Gardner v. Irvin* (1878), 4 Ex. D. 49, were referred to.

March 7. STREET, J.:—The defendant Preston objects to produce certain letters between himself and Messrs Hearst & McKay, his solicitors, “on the ground that they were all communications which passed between myself and my solicitors, Hearst & McKay, with reference to matters which are now in question in this action, and that the same are confidential communications between myself and my solicitors, and as such are privileged from production; that, when the said communications passed between myself and the said Hearst & McKay, the said Hearst & McKay bore to me the relationship of solicitors, and my said communications were written to them in their capacity of solicitors for me, and their communications to me were written by them in their capacity of solicitors for me, in reference to the matters which are now in question in this action.”

There has been a progressive development of the particularity required in the description of correspondence between a solicitor and his client in order that it may be held to be protected from discovery by reason of privilege. Much that was formerly assumed from general statements must now be specifically set forth and sworn to; the reason given being that, as the affidavit cannot be contradicted, the grounds upon which the privilege is claimed must be set forth explicitly and fully, so that the Court may judge as to whether the documents so described are properly withheld from production.

I think I am bound to follow the law as laid down upon this subject by an English Court of Appeal in *Gardner v. Irvin*, 4 Ex. D. 49, approved to its fullest extent by another English Court of Appeal in *O'Shea v. Wood*, [1891] P. 286, and substantially followed by Stirling, J., in *Ainsworth v. Wilding*, [1900] 2 Ch. 315.

The evidence upon the motion for a better affidavit of documents shews that the solicitors, Hearst & McKay, acted as agents for the defendant Preston, who was the owner of the land in question, in offering to sell it to an agent for the plaintiff, on the 13th December, 1899. At that time the legal estate

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was in the other defendant, Annie McKay, who is described as being the wife of one of the solicitors. On the 12th January, 1900, she conveyed the legal estate to her co-defendant Preston, and on that day the first of the letters in question upon this motion was written by the solicitors to Preston. The next letter is from Preston to them, on the 20th January, 1900. Then there is a letter from the solicitors to Preston on the 6th February, 1900, and one from him to them on the 10th February, 1900. There is then a gap in the correspondence until the 23rd May, 1900, the present action having been begun on the 29th May, 1900.

The statement of the law upon the subject in *Gardner v. Irvin*, 4 Ex. D. 49, at p. 53, is as follows: "It is not sufficient for the affidavits to say that the letters are a correspondence between a client and his solicitor, the letters must be professional communications of a confidential character *for the purpose of getting legal advice.*"

In *O'Shea v. Wood*, [1891] P. 286, at p. 289, the Court expressly adopts this as a correct statement of the law. Lindley, L.J., says further, that in order that a correspondence between a solicitor and his client may be privileged there must be "a professional element" in it.

In the other case of *Ainsworth v. Wilding*, [1900] 2 Ch. 315, the correspondence which was held to be protected was described in the affidavit (pp. 317, 318) as "consisting of professional advice given by my said solicitors to my co-defendant and myself with reference to the conduct of the said action of *Smith v. Wilding*, or having been made solely for the purpose of enabling my solicitors to conduct the said litigation in *Smith v. Wilding* on behalf of my co-defendant and myself, or to advise us with reference thereto."

It appears to be necessary, therefore, that the affidavit on production should not only state that the correspondence is confidential and of a professional character, but the nature of it must be set forth, without any ambiguity whatever, in order that there may be no doubt as to its being privileged.

In the present case the solicitors were acting as agents for the sale of the defendant Preston's land very shortly before the first letter was written; the client to whom it was written

lived in the State of Michigan: the solicitors who wrote it lived at Sault Ste. Marie, in Canada; and it seems to be the beginning of the correspondence in question.

It is not unreasonable to require, in view of the authorities, that the client should give some more definite description of the correspondence than that it is written "in reference to the matters which are in question in this action;" and that he should bring himself within the authorities to which I have referred; for that description does not necessarily imply that the client was by his letters consulting the solicitors in their character of solicitors and receiving legal advice from them by the letters written by them to him.

I am, of course, aware that this decision goes beyond the decision in the case of *Hoffman v. Crerar*, 17 P.R. 404, which was before me in 1897, but I think that case did not go as far as the authorities require me to go.

The appeal must be allowed, and the defendant Preston should file a further and better affidavit. The costs of the appeal will be costs in the action to the successful party in the action.

The defendant Preston appealed from the decision of STREET, J., and the appeal was heard by a Divisional Court composed of BOYD, C., FERGUSON and MEREDITH, JJ., on the 7th April, 1902.

The same counsel appeared.

THE COURT stopped the senior counsel for the respondent in the midst of his argument, and dismissed the appeal, saying that they had not been convinced by the argument for the appellant that there was any ground for interfering with the discretion exercised by Street, J., in requiring a better affidavit.

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## [DIVISIONAL COURT.]

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March 14.

HALL v. ALEXANDER.

*Easement—Projecting Eaves—Descending Water and Snow—Common Owner—Conveyances by—Grant and Reservation of Rights.*

Plaintiff's predecessor in title built two houses on a lot with a passageway between them, and with the eavestrough and part of the eaves of the westerly house projecting over the passageway. He then conveyed to defendant's predecessor in title the westerly house "with the privilege and use of the projection of the roof . . . as at present constructed," and covenanted for the quiet and undisturbed enjoyment of the projection and that on any sale or conveyance of the house to the east he would "save and reserve the right . . . to such projection."

Subsequently he conveyed the easterly house with the land between the two houses to the plaintiff "subject to the right . . . to the use of the projection . . . as at present constructed":—

*Held*, that the defendant was not bound to prevent the snow and water discharged from the clouds upon his roof from falling from it upon the plaintiff's land, and that the easement of shedding snow and water, as had been done ever since the defendant's house was built, was necessary to the reasonable enjoyment of the property granted; that the original grantor could not, after such a grant, insist upon the grantee altering the construction of the roof so as to prevent the snow and water coming down, and the plaintiff stood in no higher position than the grantor, and that the projection of the roof carried with it the necessary consequence that water and snow falling upon the roof must to a large extent descend upon the land below.

Judgment of the county court of the county of York reversed.

THIS was an appeal by the defendant from the judgment of the county court of the county of York granting an injunction restraining the defendant from discharging ice and snow upon the plaintiff's land from an overhanging roof, and assessing the plaintiff's damages in respect of the discharge of water from the defendant's eavestrough at the sum of fifty dollars.

The facts appear in the judgment of STREET, J., in the Divisional Court.

The action was tried on May 31st and June 2nd, 1901, before His Honour Judge Morgan, junior Judge of the county, without a jury.

*E. E. A. DuVernet*, and *W. W. Vickers*, for the plaintiff.

*Geo. H. Watson*, K.C., and *S. C. Smoke*, for the defendant.

October 1. MORGAN, Co. J.:—The plaintiff complains that the easterly wall of the defendant's house supports a steeply inclined roof from front to rear, and during the winter



months there is a discharge upon the plaintiff's property of large quantities of snow and ice, and that during the summer months the pathway is kept wet by water which has been discharged from the roof of the defendant's premises. She also complains that the noise of the dropping of the water is at times a nuisance, and that snow and water are discharged upon her land, owing to the defendant not causing the same to be deposited upon her own land, and not providing proper guards for hindering the same from sliding off the roof of her house to the plaintiff's lands.

The defendant sets up the conveyances through which she and the plaintiff claim title, and says, that having regard to them she has not discharged ice, snow or water upon the lands of the plaintiff, so as to in any way interfere with or invade the plaintiff's right of property. She says, that if ice, snow or water is discharged, as alleged by the plaintiff, from the said projection she, the defendant, is not responsible for such discharge, or liable to the plaintiff therefor, and it is not in any way caused by or due to her act, but is owing to the operation of natural laws, and that such a discharge is one of the incidents of the right, privilege and use by the defendant of the said projection, which right, privilege and use were granted, as is claimed by the defendant, by the predecessors in title of the plaintiff.

The defendant submits, that to hold otherwise, would be to take away from her the right, privilege and use of the projection in question which were granted to her; and that the plaintiff would thus be allowed to derogate from the grant of her predecessors in title to the defendant's predecessors in title; and the defendant submits that the plaintiff is estopped by the conveyances and by the acceptance of the plaintiff herself of a conveyance of the lands owned by her and the reservations set out in such conveyance.

The plaintiff adduced evidence at the trial to shew that the eavestrough, upon the projection in question was not properly cleaned out from time to time, and that it became choked with leaves and other accumulations, so that the water did not have free course along the trough and down the discharge pipe. The evidence also shewed that when the snow above thawed,

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the water ran down to the eavestrough where it froze, and the ice not being removed, the eavestrough served no purpose in carrying off the water. There was also some evidence that the eavestrough was not level, and that there was a certain amount of leakage from a hole in it.

It was admitted by the defendant, that at such times as the water overflowed, and was not carried off by the eavestrough, the noise of the falling water was disagreeable, especially at night time. The water is, moreover, injurious to the foundations of the plaintiff's house.

The plaintiff's claim may be divided into two branches. First, the complaint, that the defendant improperly allowed the discharge of water. Upon the evidence, the plaintiff's ground of complaint in this respect is well founded. She was willing at all times to allow the defendant to go upon the premises and make the necessary repairs. I think the plaintiff is entitled to a declaration, that the defendant must put and keep the eavestrough in a proper state of repair, and as to the form of the order, reference may be had to the recent case of *Jackson v. Normanby Brick Co.*, [1899] 1 Ch. 438. The eavestrough was on the projection at the time of the severance of the easements, and it is plain, therefore, that it was intended, that the water should be carried away and not allowed to fall on the adjoining lands. The conveyances, therefore, cannot be relied upon by the defendant as to this branch of the case. The damages of this branch of the case should be assessed at \$50.

In regard to the snow and ice, which is admittedly discharged during the winter in large quantities upon the plaintiff's land: the defendant's counsel strenuously contends there is an implied easement created by reason of the conveyances above referred to. It is very questionable whether there is such an easement, as the right to discharge ice and snow. The different kinds of easements are well known, and, as is pointed out in *Goddard's Law of Easements*, 5th ed., p. 109, the law will not permit a land owner to create easements of a novel character and annex them to the soil, so as to bind it in the hands of future owners. All the known easements are set out in *Goddard's work*, and there is no sugges-

tion that there is such an easement as that now claimed by the defendant.

There is nothing in the clause in the deed relied on by the defendant to give expressly the right now claimed, and ample meaning and effect can be given to it without extending it so as to include the implied right claimed by the defendant.

Without the clause in question, and apart from the provisions of the Revised Statutes of Ontario, ch. 119, sec. 12, upon which the counsel for the defendant does not rely, the defendant had no right whatever to maintain the projection, which of itself would be adjudged a nuisance. See *Fay v. Prentice* (1845), 1 C.B. 828.

The defendant's right is limited to the actual space occupied by the projection: *Corbett v. Hill* (1870), L.R. 9 Eq. 671.

The defendant has not the right *usque ad solum* any more than the right *usque ad coelum*. In the recent case of *Harris v. Martin*, a judgment of the Divisional Court delivered by Street, J., the Court refused to allow an easement to be implied. There is no evidence that an easement, has, in this case, been established, either expressly or impliedly.

Upon the evidence it appears that one Turner, who was a builder, erected these two houses and others at the same time. The defendant's predecessor in title must, therefore, be held to have known that the four feet, to the west of the plaintiff's house, was intended to be used as a side entrance and not as a receptacle for ice and snow. As was pointed out in *Birmingham, Dudley and District Banking Co. v. Ross* (1887), 38 Ch. D. 295, the maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement to any extent inconsistent with the intention, to be implied from the circumstances existing at the time of the grant and known to the grantee. See also *Russell v. Watts* (1882), 25 Ch. D. 559, (1885), 10 App. Cas. 590.

If the law were as contended for by the defendant's counsel, property owners would have a new and unusual duty to observe in the protection of their rights. If such an easement can be established by implication, there is no reason why it should not be established by prescription. If, therefore, an owner when building should at first not build to his lot line, and, subse-

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quently, after a lapse of a sufficient length of time to create an easement, should seek to extend his buildings to his lot line, the neighbouring land owner, from the roof of whose premises at uncertain and perhaps very infrequent times ice and snow had fallen, might restrain him if it interfered with an alleged easement.

If, therefore, as appears in evidence in the case now under consideration, ice and snow fall frequently and in large quantities on the plaintiff's land, which is used as a side entrance to her house, it is a nuisance not only of an annoying but a dangerous character, and it hardly can be contended that the maintenance of such a nuisance is necessary to the reasonable enjoyment of the defendant's property, or that the original common owner, or any of the grantees under him, contemplated or intended the creation and maintenance of an easement or right to have ice and snow discharged from the roof in question on to the land, now owned by the plaintiff. To restrain the defendant from discharging snow and ice on the plaintiff's land will not result in any hardship to her, because by simple devices such as ice guards, and by keeping the eavestroughs and water pipes in good condition, she can remove the plaintiff's cause of complaint. The right to discharge ice and snow from the defendant's roof on to the plaintiff's land is in no sense an easement of urgent necessity, such as might arise by implication, because it can be disposed of in other ways without any difficulty, and, as is said by Street, J., in *Harris v. Martin* (unreported), referring to a discharge of ice and snow as in this case, certainly without as much difficulty as the Court would have in assuming a grant to the defendant, either expressly or by implication of the rights claimed by her.

Judgment will be for the plaintiff for a declaration that the defendant must put and keep in repair the eavestrough upon the projecting eaves of her house, so as to prevent the discharge of water upon the plaintiff's side entrance, and there will be judgment for the plaintiff against the defendant for the sum of \$50 in respect of damage arising from the past discharge of water from the eavestrough.

The plaintiff is entitled to an injunction restraining the defendant from further discharging ice and snow from her roof



or the projection which now exists over the plaintiff's land. There will be the general costs of the cause to the plaintiff as against the defendant.

Judgment to be entered in terms as above, and injunction to be issued as granted.

From this judgment the defendant appealed, and the appeal was argued on February 12th, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET, J.

*Watson*, for the appeal. Prior to February 27th, 1888, both houses were vested in a common owner. On that date he conveyed defendant's house, granting the right to the overhanging roof and eavestrough, and he covenanted for quiet enjoyment, and that in any future conveyance of the adjoining property, he would reserve and protect that right. The Judge below has dealt with the matter as one of implied grant and implied reservation. The defendant could claim the right as an implied one, but her position is secure by the terms of the conveyances which expressly grant the right. There is a distinction between an implied reservation and an implied grant. The latter is more easily established and held. Even if these two properties had been sold at the same time, and each purchaser knew of the sale to the other, the right to any continuous easement, if enjoyed at the time of the sale, passes. The quasi easement becomes after severance an absolute legal right: *Hart v. McMullen* (1900), 30 S.C.R. *per* Sedgewick, J., at p. 253. All the continuous and apparent easements necessary for the reasonable use of the property granted at the time of the grant used by the owner passed for the benefit of the part granted: *Israel v. Leith* (1890), 20 O.R. 361, where the authorities are reviewed: see especially *per* STREET, J., at p. 367. I refer also to Goddard's Law of Easements, 5th ed., pp. 152, 348, 349; Gale's Law of Easements, 7th ed., pp. 96, 257; *Harvey v. Walters* (1872), L.R. 8 C.P. 162; *Thomas v. Thomas* (1835), 2 C. M. & R. 34; *Suffield v. Brown* (1863), 33 L.J. Ch. 249; *Wheeldon v. Burrows* (1878), 12 Ch. D. 31; *Attrill v. Platt* (1883) 10 S.C.R. 425. The evidence did not shew any want of repair, and no damages should have been found against the defendant.

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*DuVernet*, and *Vickers*, contra. The right to the projection may have been granted and the right to keep it and the eavestrough there, and the right to the water passing through the eavestrough, but nothing more: *Laybourn v. Gridley*, [1892] 2 Ch. 53. Only the space covered by the projection passed: *Corbett v. Hill*, L.R. 9 Eq. 671. Water dropping from the roof on to the plaintiff's land is a trespass, unless there was an express or implied grant: *Birmingham, Dudley and District Banking Co. v. Ross*, 38 Ch. D. 295; *Burrows v. Lang*, [1901] 2 Ch. 502. Dumping snow and ice is not an easement, but a nuisance: *Lemmon v. Webb*, [1894] 3 Ch. 1 at p. 21. Putting the eavestrough there originally was notice that the drippings were not to be allowed to fall. We refer to Gale's Law of Easements, 7th ed., pp. 120, 286; *Alston v. Grant* (1854), 3 E. & B. 128; *Broder v. Saillard* (1874), 2 Ch. D. 692; *Carter v. Grasett* (1888), 14 A.R. 685; *Russell v. Watts*, 25 Ch. D. 559, at p. 569; 10 App. Cas. 590. The evidence shewed the eavestrough was out of repair: *Schwab v. Cleveland* (1882), 28 Hun (S.C.R. N.Y.) 458.

*Watson*, in reply. The express grant to the defendant carried the full use and enjoyment, not the structure merely.

March 14. The judgment of the Court was delivered by STREET, J.:—The plaintiff is the owner of house No. 18 Classic Avenue, Toronto, and the defendant is the owner of house No. 20, being the next house to the west.

There is a space of four feet between the side walls of the two houses; this space is the property of the plaintiff, and is used by her as a pathway to a side entrance to her house.

The east wall of the defendant's house is built close up to the boundary of his land, and the roof slopes sharply to the east, terminating in an eavestrough.

The eavestrough and a part of the projecting eaves of his roof overhang the plaintiff's pathway.

Both properties were parts of city lot 47, and were owned before February, 1888, by one Turner, by whom both houses were built before that date.

On 27th February, 1888, by a conveyance in the statutory form, which was duly registered on 1st March, 1888, Turner

conveyed house No. 20 to one Grant in fee simple by metes and bounds, adding to the description the following words: "Also the right and privilege and use of the projection of the roof of the house on the above premises, as at present constructed, over and above that part of said lot 47, immediately to the east of the premises conveyed hereby."

The conveyance contained a covenant by Turner for himself, his heirs, executors, administrators and assigns, with the grantee that he and his heirs, executors, administrators and assigns "should have quiet and undisturbed enjoyment of the projection of the roof of the house, built upon the lands conveyed hereby, as now constructed, over and upon the lands immediately to the east of the lands conveyed hereby, and that the party of the first part" (Turner) "his heirs, executors, administrators and assigns, on any sale or conveyance of the lands immediately to the east of the lands conveyed hereby, shall save and reserve the right of the party of the third part, his heirs, etc., to such projection."

The property and rights passing by this conveyance became finally vested in the defendant, by deed, on 21st September, 1896, and she has since that date occupied the house in question. The roof, eaves, and eavestrough are in the same condition as at the date of the original conveyance from Turner.

On 8th May, 1888, Turner conveyed house No. 18, with the land between the two houses, to the plaintiff in fee simple, "subject to the right of the owners of the westerly part of the said lot 47, to the use of the projection of the roof of the house on the westerly portion of said lot 47, as at present constructed, over and above the westerly portion of the lands hereby conveyed."

The plaintiff has ever since this conveyance occupied the house No. 18, using the space between the two houses as a pathway to her side entrance.

In the winter the snow and ice from the defendant's roof slide down and fall upon this pathway, and at other times the water overflows the eavestrough and drops upon it.

The present action was brought in the county court of York on 13th of March, 1900, complaining that the discharge of water, snow and ice from the defendant's roof was illegal and

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was not authorized by the terms of the conveyance under which she held: and she claims damages and an injunction.

The defendant claims that under the terms of the conveyance from Turner, and the subsequent conveyances under which her title is derived, the right to maintain the roof with all its natural consequences is conferred upon her.

After hearing the evidence, the learned junior Judge of the county court gave judgment for the plaintiff for \$50 damages, and granted a perpetual injunction to restrain the defendant from permitting the snow, ice and water to be cast from her roof upon the plaintiff's land.

In my opinion, with great respect for that of the learned junior Judge, this judgment cannot be sustained.

It is abundantly plain from the evidence of the plaintiff's husband and the other witnesses, that the real and substantial complaint from which the alleged damage resulted, was that the defendant did nothing to prevent the snow and water from her roof from falling upon the strip of land between the houses.

The attempt made to shew that some trifling part of it arose from want of repair to the eavestrough seems to me to have utterly failed, and the question before us really and substantially is, whether the defendant, whose roof and eavestrough are in precisely the same shape and condition, as when the original conveyance was made by Turner to the defendant's predecessor in title on 27th February, 1888, is bound to prevent the snow and water discharged from the clouds upon his roof from falling from it upon the plaintiff's land.

In my opinion no such obligation rests upon the defendant under the terms of the conveyances and the facts in evidence here.

The rule, governing this case, is laid down by Lord Justice Thesiger, delivering the opinion of the Court of Appeal in *Wheeldon v. Burrows*, 12 Ch. D. 31, as follows: "On the grant by the owner of a tenement of part of that tenement, as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant



used by the owner of the entirety for the benefit of the part granted :” p. 49.

At the time of the grant from Turner to the plaintiff’s predecessor in title on 27th February, 1888, the two houses in question had been built, and the easement of shedding snow and water, as has been done ever since, was necessary to the reasonable enjoyment of the property granted. Any doubt upon this point is set at rest by the express terms of the grant, which expressly gives the right to *use the roof as at present constructed* over the portion of land which was retained by the grantor.

It is quite plain, that the grantor could not, after such a grant, insist upon the grantee altering the construction of the roof so as to prevent the snow and water from coming down ; and the plaintiff stands in no higher position than the original grantor, Turner.

The special grant of the right to maintain the projection of the roof over the plaintiff’s land carried with it the necessary consequence that water and snow falling upon the roof must to a large extent descend upon the land below.

In my opinion the appeal must be allowed with costs, and judgment should be entered in the Court below dismissing the action with costs,

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## [DIVISIONAL COURT.]

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March 11.

*Writ of Summons—Service out of Jurisdiction—Option Exercised through Post Office—Contract—Terms—Acceptance—Onus.*

An appeal from the judgment, reported *ante* p. 47, to a Divisional Court was dismissed with costs.

*Per* FALCONBRIDGE, C.J.—If the agreement of May 1st, 1899, was complete, the contract was made in Quebec; but if it was to be completed by the subsequent acts of the parties, there was no authority to the plaintiff to use the post office as a means of communication.

*Per* STREET and BRITTON, JJ.—The plaintiff might have notified the defendants that he desired them to become the purchasers of the goods, but he had no right to prescribe the dates at which the defendants should pay for them. His letter was only a proposal to take the goods upon the terms proposed therein, requiring an acceptance by the defendants to make it a complete contract; the onus of shewing which was on the plaintiffs, and was not satisfied.

Judgment of Meredith, C.J., affirmed.

THIS was an appeal by the plaintiff from the judgment of Meredith, C.J.C.P., reported *ante*, p. 47, where the facts are fully set out.

The appeal was argued on February 11th, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET and BRITTON, JJ.

*J. A. Worrell*, K.C., for the appeal. The fact that the contract in writing was made in Montreal does not affect the question here of the plaintiff's right to bring his action in Ontario. The goods which are being sued for were the subject of an option, to be exercised by the plaintiff as provided by the written contract, and that option was exercised by him, by letter, written and posted in Toronto, which was the final assent to the defendants becoming the purchasers: and the cause of action arose and the writ of summons was properly issued in Ontario: *The Eider*, [1893] 1 P. 119, at pp. 128, 131, and 136; *Robey v. Snaefell Mining Co., Limited* (1887), 20 Q.B.D. 152; *Thomson v. Palmer*, [1893] 2 Q.B. 80; *Rein v. Stein*, [1892] 1 Q.B. 753; *O'Donohoe v. Wiley* (1878), 43 U.C.R. 350; *Gildersleeve v. McDougall* (1880), 31 C.P. 164.

*George Kerr*, contra. There must be a breach in Ontario of a contract to be performed in Ontario, in order to entitle the plaintiff to bring his action in Ontario. The contract here was made in Montreal. There was no provision as to how the option was to be exercised. The defendants were entitled to know of its exercise, and if the letter had miscarried they would not have known. There was no arrangement or consent that the post office should be used as the means of communication: *Bell & Co. v. Antwerp* [1891] 1 Q.B. 103; *Comber v. Leyland*, [1898] A.C. 524 at p. 528; *Sidar Gurdyal Sing v. The Rajah of Faridcote*, [1894] A.C. 670, at p. 684.

*Worrell*, in reply.

March 11. FALCONBRIDGE, C.J.:—The following are the grounds of appeal:

1. That the contract of sale of the goods in question was not completed by the written agreement of the 1st of May, 1899, but by the acts of the plaintiff in Toronto, namely, (a) the mailing to the defendants of the letter of December 17th, 1899, notifying them of the plaintiff's election to sell; and (b) the despatch of the goods from Toronto to the defendants in accordance with such election, and that therefore the contract must be held to have been made in Ontario.

2. That no place of payment having been mentioned in the contract of sale, it should be held that payment must be made where the plaintiff resides, namely, at Toronto.

3. That the defendants having failed to make payment of the price of the goods in Toronto, a breach occurred in Ontario of the contract, which was to be performed there, and the plaintiff was therefore entitled to serve the defendants with the writ under the provisions of Rule 162 (e).

4. That the learned Chief Justice erred in holding that the contract was not complete until the receipt of the plaintiff's letter of the 17th of December, 1899, in Montreal, and that therefore the contract was made in Montreal and not in Toronto.

5. That the learned Chief Justice further erred in holding that the breach of contract had not occurred within the Province of Ontario.

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6. That the learned Chief Justice erred in holding that the law of the Province of Quebec, requiring payment to be made at the domicile of the debtor, applied, instead of the law of Ontario—that the debtor must seek his creditor.

If we have to look to the agreement of 1st May only for the purpose of determining where the contract was made, I think that the arguments and opinions set forth in the two judgments below are entirely right, and I have nothing to add to them.

But if, as contended by the appellant, the contract was not completed by that agreement, but by the subsequent acts of the parties, I fail to find any express or implied authority to plaintiff to employ the post as a means of communicating to the defendants the fact that he is “willing to sell” the goods to the defendants.

The mere fact that he was “willing to sell” does not conclude the matter. That willingness must be signified to the defendants, who have not designated the post office as their agents to receive the information: Chitty on Contracts, 12th ed., pp. 14, 15; cases cited in Buckley’s Companies Acts, 7th ed., p. 69, *et seq.*

The appeal must be dismissed with costs.

STREET, J.:—I agree in the conclusion that this appeal should be dismissed. The plaintiff is entitled to bring his action in this Province, only in case a breach of the contract sued on took place in this Province.

The breach alleged to have taken place in this Province is non-payment of the purchase money for the goods sued for. Under our law the debtor is obliged to find out his creditor to pay him. The plaintiff lives in this Province, and if the contract is to be governed by the law of this Province, then the defendants being obliged to pay the plaintiff here, and having failed to do so, have committed a breach of the contract in this Province.

If, on the other hand, the contract is to be determined by the law of the Province of Quebec, under which the creditor is only entitled to payment where his debtor resides, then the



breach took place in the Province of Quebec and not in the Province of Ontario.

The position of the plaintiff, on the present appeal, is that an option existed under the contract of the 1st May, 1899, entitling him to require the defendants to purchase the goods in question, upon his notifying them that he desired them to become the purchasers, and that he did so notify the defendants by letter in the following words:—

“Toronto, December 17th, 1900.

Messrs. Malone & Robertson,  
Montreal,

Gentlemen,

We beg to advise you that we are now returning to you the remaining M. & H. engravings, 15 × 20 and 20 × 28, oleos, as per terms of your letter November 7th, 1899; and would thank you to send us notes, one-half due March 4th, balance May 4th, 1900.”

The letter of November 7th, 1899, here referred to, is set out in the judgment of the Master in Chambers, and by it we are referred to the terms of the agreement of the 1st May, 1899, between the plaintiff and the defendants; so that the plaintiff, in his letter of December 17th, 1900, merely advised the defendants that he was returning the goods upon the terms of the agreement of 1st May, 1899, and asked them to send their notes, half due March 4th, balance May 4th, 1900.

A reference to the agreement of 1st May, 1899, shews the agreement between the parties to have been this: that the goods in question were left in the hands of the defendants upon the understanding, that if he required the defendants to become the purchasers of them, the defendants would pay for them at stock price therefor, at such dates spread over one year from the 1st May, 1900, *as should be agreed upon*.

Under the terms there set forth, it appears to me that the plaintiff might have notified the defendants simply that he desired the defendants to become the purchasers of the goods; but he obviously had no right to prescribe the dates at which the defendants should pay for them. He was entitled to have

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his money by the 1st May, 1901, but he had no right to insist upon payment at any earlier date.

If he had simply notified the defendants that they must buy the goods, without adding anything as to terms, the defendants would then have been obliged to take the goods and pay for them by the 1st May, 1901; but it will be observed, that in his letter of December 17th, 1900, the plaintiff did not notify the defendants that they are to become the purchasers of the goods; he merely advises them, that he is returning the goods to them and points out that the defendants are bound to receive the goods under the agreement of November 7th, 1899. He winds up by asking for the defendants' notes, payable at dates, which he is not entitled to insist upon.

He remained in such a position, under the terms of this letter, as to be able in case the defendants refused to give the notes asked for, of saying, I only intended that you should take the goods in case you should give me the notes, payable upon the dates mentioned in my letter; and if you will not give me those notes, then I will not sell you the goods.

It follows from this that the letter upon which the plaintiff relies for his contention, that the contract was made finally in Toronto, was only a proposal to the defendants, that the defendants should take the goods upon the terms proposed therein, and was not a final or binding contract.

It required an acceptance on the part of the defendants in order that a complete contract might be created.

The onus is upon the plaintiff to prove to the Court that a contract was made in this Province. He has not shewn upon the material before us in what manner the final contract was made. It is evident, that some contract was made between plaintiff and defendants after December 17th, 1900, for the purchase of the goods in question, or a part of them, for the defendants have given their note for \$266, dated 1st January, 1901, in part payment; but there is nothing before us, to shew when or where that contract was made.

The plaintiff's appeal, therefore, fails, and should be dismissed with costs.

BRITTON, J., concurred in the judgment of STREET, J.

## [DIVISIONAL COURT.]

THE BIRKBECK LOAN CO.

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March 5.

*Trusts and Trustees—Shares in Building Society—Mortgage of Shares held “in Trust”—Notice—Purchaser of Land Subject to Mortgage Collateral to Loan on Shares without Notice that Shares Pledged for Prior Loan—Consolidation—Purchaser of Trust Shares.*

The defendant mortgagor being the holder of six shares of class “A” permanent stock in her own name, and six shares of class “C” instalment stock “in trust,” and other shares of class “B” stock in a building society, obtained a loan of \$700 from the plaintiffs’ company and transferred to their treasurer, as security, “all my stock in the said company, consisting of shares of classes A, B, and C stock, held by me in the said company,” and “all other stock or shares held by me in the said company.”

Subsequently she obtained a further loan of \$600, and transferred to the treasurer, as security, six shares of class C instalment stock, the intention being to transfer the six shares held “in trust” and already assigned, as the plaintiffs contended to secure the prior loan of \$700, giving also a mortgage on land reciting that she was the owner of six shares of the capital stock of the plaintiffs’ company, and that the plaintiffs had agreed to advance \$600 upon the said shares, with such mortgage as further security.

The mortgagor afterwards conveyed the lands to a purchaser, subject to the \$600 mortgage, who assumed the mortgage, and also purchased from the mortgagor her equity on the six shares of instalment stock so held “in trust,” subject also to the \$600 mortgage.

In an action by the plaintiffs claiming consolidation of the loans and payment of both mortgages or foreclosure:—

*Held*, that the use of the words “in trust” put the plaintiffs upon inquiry, and they were affected by the notice that the mortgagor was not the owner of the shares and had no power to mortgage:—

*Held* also, that sec. 53 of ch. 205 R.S.O. 1897, which relieves a company from seeing to the execution of any trust to which shares are subject, did not empower the plaintiffs to disregard the trusts.

The purchaser brought into Court the arrears due on the collateral mortgage, and the plaintiffs accepted the amount in satisfaction of such arrears:—

*Held*, that the plaintiffs could not consolidate the two mortgages as against the purchaser, as she was a purchaser for value without it being shewn that she was aware, at the time she bought the equity of redemption in the lands, that any prior mortgage existed against the six shares in the hands of the plaintiffs.

Judgment of MacMahon, J., reversed.

THIS was an appeal from the judgment at the trial, in an action brought by the plaintiff company against Amelia Johnston, Frank K. Johnston, and the appellant Anna K. Johnston.

The following facts are taken from the judgment of STREET, J., in the Divisional Court:—

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The plaintiffs are a building society incorporated under ch. 169 R.S.O. of 1887.

The defendant Amelia Johnston, on 20th July, 1897, was the holder of the following stock in the company, the ownership of which is material for the purposes of the present action :

Six shares of permanent stock, class A, standing in her own name, without any trust affecting it.

Four shares of instalment stock, class C, standing in her name "in trust." These shares had formerly stood in her name "in trust for Amelia Johnston, jr.," but she had been allowed to cancel the certificate, which was in that form and to substitute for it the certificate in which the shares appeared in her name simply "in trust."

One share of instalment stock standing in the name of "Amelia Johnston in trust for Miss Amelia Johnston."

One share of instalment stock standing in the name of Amelia Johnston "in trust for Miss Marjorie Johnston."

The last two shares had originally been issued as stock of class D, but by consent they had been changed to class C.

Mrs. Johnston also held some shares of instalment stock belonging to class B, with very little paid upon them. Her holdings may then be shortly restated as follows :

6 shares permanent stock A, in her own name.

4 " instalment " C, "in trust."

1 share " " C, "in trust for Miss Amelia Johnston."

1 " " " C, "in trust for Miss Marjorie Johnston."

Some shares of B stock, of little value.

On 20th July, 1897, Amelia Johnston executed a transfer to the treasurer of the plaintiffs' company, as security for an advance of \$700, then made to her, of the following : "All my stock in the said company, consisting of shares of classes A, B, and C stocks, held by me in the said company."

On the 1st October, 1897, she obtained a further advance of \$600 from the company, and transferred to the treasurer, as security "six shares of class C, instalment stock." It is admitted that the six shares intended to be transferred are the



same six shares, as those standing in her name as trustee as above mentioned.

As further security for this advance, she executed on the same day a mortgage to the company upon certain lands in the town of Strathroy and the city of Toronto, in which it is recited, that she is the owner of six shares of the capital stock of the company; and that the company had agreed to advance to her \$600 upon the said shares, with this mortgage as further security.

Afterwards, the defendant, Frank K. Johnston, bought from his mother, the defendant Amelia Johnston, the Strathroy property, he assuming the mortgage for \$600, and paying some money in upon the six shares of C stock.

Afterwards, the defendant, Anna K. Johnston, bought from Frank K. Johnston the Strathroy property, and, from the assignee of her mother, Amelia, the Toronto property, both subject to the mortgage for \$600, which she assumed.

Finally, in July, 1901, the defendant, Anna K. Johnston, purchased from her mother, Amelia, her supposed equity in the six shares of C stock, subject to the \$600 mortgage.

The present action is brought against Amelia Johnston, Frank K. Johnston, and Anna K. Johnston, claiming payment of the amount of both mortgages, and asking for foreclosure of the interest of the defendants in the stock in default of payment.

The defendant, Amelia Johnston, filed no defence; the defendants, Anna K. and Frank K. Johnston, filed a defence admitting the making of the mortgage of 1st October, 1897, and the transfer of six shares of C stock to the company, but putting the plaintiff to the proof of the mortgage of July, 1897. They brought into Court the arrears upon the mortgage of October, 1897, and the plaintiffs accepted the amount in satisfaction of such arrears.

Amelia Johnston was examined for discovery, and parts of her examination were put in by the plaintiffs at the trial, the other defendants objecting that it was not evidence against them.

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The action was tried at London on September 28th, 1901, before MACMAHON, J., without a jury.

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*T. H. Luscombe*, for the plaintiffs.

*Talbot Macbeth*, K.C., and *P. H. Bartlett*, for the defendants.

MacMahon, J.

November 8. MACMAHON, J.:—Each of the stock certificates issued by the plaintiff company was for the sum of \$100.

On the 13th of November, 1893, two share certificates of the plaintiff company of instalment class D, numbered 41 and 42, were issued to the defendant, Amelia Johnston; No. 41 being in trust for her infant daughter, Marjorie, and No. 42 in trust for her infant daughter, Amelia. The monthly payments on each of these shares was forty cents.

In July, 1894, the defendant, Amelia Johnston, who had made all the payments on these shares, had them converted into class C, on which the monthly payments were sixty cents. And, although there does not appear to have been a cancellation of the former certificates, and certificates for class C shares issued in substitution thereof, all payments made from July, 1894 were made on class C stock, and so entered in the pass-books.

The defendant, Amelia Johnston, became the owner of two shares of class B stock, which, at the time of the advance of \$700 made by the plaintiff company hereinafter referred to, had only about \$8 paid thereon. She was also the owner of two shares of class C stock, under certificate No. 61, and on the 25th January, 1896 she purchased two other shares of class C stock, when certificate No. 61 was cancelled, and certificate No. 452 was issued to her for four shares of class C stock.

On the 30th April, 1896, she purchased from the plaintiff company six shares of class A fully paid up shares, called permanent stock.

On the 20th July, 1897, the defendant Amelia Johnston obtained from the plaintiffs a loan of \$700, for which she gave as security an assignment of her stock in the company, consisting of shares of classes A, B, and C stocks, which were charged with "the repayment of the said advance." And by the terms of the said assignment, the assignor charges "all other stock or shares or money at any time hereafter held by me, or which

may be in my name in the said company, or in the capital stock thereof, or in the books thereof, with the repayment of the said advance and all other advances, and with the payment of all interest, costs, and charges to become due in respect thereof." The interest on the loan is  $10\frac{4}{5}$  per cent. The advance is to be paid "at the expiration of the term of maturity of class C stock, and with the privilege of repayment at any date convenient to me (the assignor) from date."

On the 1st October, 1897, the defendant, Amelia Johnston, applied for and obtained an advance of \$600, for which she gave as security an assignment of "six shares of class C instalment stock, held by me in the said company." All stocks are by the assignment charged in the same way, as in the assignment of the 20th of July, 1897. On the same day (1st October, 1897), she, by an indenture of mortgage, which recites that she is a member of the said company, and the holder of six shares of the capital stock thereof, and, as a further security for such advance, had agreed to execute the said mortgage on the lands in Strathroy and Toronto, set out in the statement of claim.

The defendant, Amelia Johnston, sold and conveyed the lands in Strathroy to her son, the defendant Frank Keefer Johnston, subject to the plaintiff's mortgage. And Frank Keefer Johnston, prior to this action being brought, sold and conveyed the said lands to his co-defendant, Anna Keefer Johnston, subject to such mortgage. Anna Keefer Johnston had likewise purchased the lands in Toronto, mentioned in the mortgage, subject to the mortgage to the plaintiff company.

The defendants Frank Keefer Johnston and Anna Keefer Johnston paid into Court \$163 as being sufficient to pay any arrears under said mortgage.

The plaintiffs accepted the moneys paid into Court in full of the arrears due at the commencement of the action, in respect of the mortgage held by them on the lands in Strathroy and Toronto, as set out in the pleadings, and make no further claim in respect thereto, except as to costs.

Then as to the cause of action, arising out of the assignment of the 20th of July, 1897. The defendant Anna Keefer Johnston, in the 5th paragraph of her statement of defence,

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alleges that she, for good and sufficient cause, purchased from the mortgagor, Amelia Johnston, the six shares of stock, set out in the said mortgage, and is the holder and owner thereof, and has notified the plaintiff company of her ownership thereof; but the said plaintiff company have refused to acknowledge her as the owner thereof, or to grant her the rights and privileges of a stockholder in the said company.

The defendant Amelia Johnston did not defend the action.

The two certificates 41 and 42 were delivered to the plaintiff company as part of the security for the \$700 loan, and, although certificates for D stock, they were not assigned as such, as they had ceased to exist as D stock in July, 1894, and from that time were C stock, and were included in the assignment of 20th July, 1897, as part of the C stock, held by the defendant Amelia Johnston. And the four shares of C stock, held by her under certificate 452, and the two shares converted from D to C stock, formed the six shares of C instalment stock, mentioned in the assignment of 1st October, 1897.

That the defendant, Amelia Johnston, knew that the six shares of C instalment stock, assigned to the company on the 1st of October, 1897, were those covered by certificates 41, 42, and 452, and are the same shares, that were assigned on the 20th of July, 1897, is made abundantly clear by her examination for discovery. She was asked:

"Q. You also executed that assignment of stock (dated 1st October, 1897, produced, marked as exhibit H)? A. That will be for the six shares of class C? (examines). Yes, that is all right.

"Q. The stock transferred by this assignment, exhibit H, is said to be six shares of class C stock? A. Yes.

"Q. That would be the stock which you had under these certificates that were put in—A (certificate 41), B (certificate 42), C (certificate 452)? A. Yes.

"Q. These shares represented by certificates A, B, and C had been already assigned as security for the advance in July? A. Yes, they had been assigned to the company.

"Q. And the assignment of the 1st October, 1897, was an assignment of your interest in the six shares, subject to the prior assignment of July, 1897? A. No, they were not; it



was a distinct and separate loan, a distinct and separate assignment; no connection whatever.

"Q. You misunderstand me. You had assigned these six shares to the company by your assignment of July? A. Yes.

"Q. Then, whatever interest you had left in them after that, you assigned to the company by your assignment of October? A. They had nothing to do with each other.

"Q. I know that; but you assigned your six shares by your July assignment? A. Yes, six shares class C.

"Q. These were assigned to the company as security for the \$700 loan? A. Yes.

"Q. Then subsequently you assigned the same six shares to the company as security for a \$600 loan? A. No; you are trying to confuse me; the six shares of instalment stock were not assigned with the first shares of permanent stock.

"Q. If you look at that assignment (produced), dated in July, you will see that you did. You specify class C stock there? A. (examines assignment of July).

"Q. I want you to see that by this assignment of July, you assigned to the company your class C stock? A. Yes, I see it is included there.

"Q. That C stock which you then assigned was the stock represented by the three certificates, exhibits A, B, and C? A. Yes, that is the same stock.

"Q. And it was the same class C stock, that you subsequently assigned in October? A. Yes, I see all the stock is included in this.

"Q. It is specifically mentioned there? A. Yes, I see it is specifically mentioned.

"Q. So that the two assignments cover the same six shares of class C stock? A. Yes, that is right.

"Q. These six shares of class C stock are said to be taken in trust? A. Yes, they were taken in trust.

"Q. In trust for two infant children? A. Yes; I took them in trust when I took the certificates.

"Q. The moneys that were paid on these shares were your own moneys? A. Well, I don't know as they ought to be included as that; some of it might have been. It was a

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general fund that I had—life insurance. I had nothing of my own, excepting what I got from my husband's life insurance."

She was fully cognizant in July, 1897, that the stock, held in trust for her infant daughters, was being assigned by her, as security for the advance of \$700 then made. But it is apparent from her evidence that she thought, when she was assigning the same stock on 1st of October as security for the \$600 advance, that, it being a separate transaction, so soon as that advance was paid off, the plaintiff company were not entitled to hold the said stock, as security for the \$700 advance made in July.

I find that the defendant Amelia Johnston sold to her daughter and co-defendant, Anna Keefer Johnston, the said six shares of C instalment stock, who paid the sum of \$400 therefor. Prior to such sale, Anna Keefer Johnston was told by her mother of the two advances made by the plaintiff company, and the opinion was expressed by the mother, that, on being paid the amount of the advance secured by the mortgage of the 1st of October, the company could not hold such stock as a security for the \$700 advance made in July. It was partly on the strength of the opinion thus advanced, that the purchase was made and the \$400 paid.

It is clear that the plaintiff company is entitled to hold the six shares of C stock, as security for the payment of the balance due on the loan of the 20th July, 1897.

The action will be dismissed as against the defendant, Frank Keefer Johnston, without costs.

There will be judgment for the plaintiffs, declaring that the mortgage on the land referred to in the second paragraph of the statement of claim has been satisfied by the payment into Court of the sum of \$163, and the acceptance by the plaintiffs of the same; and that the defendant Anna K. Johnston is entitled to have a discharge of the said mortgage executed by the plaintiffs on a tender thereof.

2nd. Declare that plaintiffs are entitled to hold the six shares of C stock as security for the repayment of the balance due on the loan of \$600 to defendant Amelia Johnston of 20th July, 1897.

3rd. Declare that, subject to the declaration aforesaid, and as between the defendants, Anna K. Johnston and Amelia Johnston, said defendant, Anna K. Johnston is the owner of said six shares of C stock, and as such is entitled to redeem the same upon payment to the plaintiffs of the balance due for principal and interest, in respect of said loan of \$600 to said defendant, Amelia Johnston, together with their costs of this action, including the costs of the reference hereinafter directed.

4th. Reference to Master at London to take accounts and tax costs.

5th. Order payment of amount due for principal and interest and costs as aforesaid by defendant Anna K. Johnston, within two months of the Master's report, and upon such payment that said six shares of stock be assigned or transferred to said defendant, Anna K. Johnston.

6th. In default of payment as aforesaid, said defendant, Anna K. Johnston, to be foreclosed of all right, title, and interest of, in, and to the said six shares of stock.

7th. Dismiss action against the defendant Frank Keefer Johnston without costs.

From this judgment the defendant, Anna K. Johnston, appealed, and the appeal was argued on February 13th, 1902, before a Divisional Court composed of STREET and BRITTON, JJ.

*Bartlett*, for the appeal. The transfer from the mortgagor, Amelia Johnston, only passed her own shares to the company, and cannot be construed to include shares held by her "in trust." The plaintiff company must shew an intention to mortgage the trust shares, and that such mortgage was made with the consent of the parties beneficially entitled thereto, and the evidence fails to disclose any such intention or consent. Without such consent, the trustee would have no power to mortgage the shares. Section 53 of ch. 205 R.S.O. 1897, relieves the company from the liability of seeing to the disposition of any moneys that properly reaches the trustee's hands, but does not enable the trustees to mortgage the shares without the consent of the parties beneficially entitled. No consolidation of the two mortgages could be allowed, as they

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were separate transactions, and Anna K. Johnston, being the purchaser for value of the lands, having no notice of the first mortgage, could only be held liable for the second mortgage, and she was relieved as to this mortgage by payment of the money into Court, which the company accepted in full of her liabilities as to that mortgage.

*Luscombe*, contra. The whole of the stock, both held personally and "in trust" passed under the wording of the assignment and was liable for the advance. The company in their by-laws had only power to lend to the extent of ninety-five per cent. on the stock; and if only personal stock passed, the company would be lending \$700 on \$600 worth of stock. The company may disregard any trust by virtue of R.S.O. 1897, ch. 205, sec. 53, and may deal with the registered owner without regard to any trust: *Simpson v. Molsons Bank*, [1895] A.C. 270.

March 5. The judgment of the Court was delivered by STREET, J.:—The defendant, Amelia Johnston, held all the six shares of C stock in trust for her children. As to two of the shares, the trust is declared on the face of the certificates; as to the other four, which stood in her name, simply "in trust," those words are sufficient to put a person dealing with her upon inquiry, and her evidence put in by the plaintiffs, shews that they were held by her in trust for her children.

She had the proceeds of an insurance upon her late husband's life; she says, he asked her to set aside \$1000 of it for the children when he was dying, and that these shares were taken in order to carry out his request.

The company are affected with notice that she was not the owner of the shares, and had no power to mortgage them, just as any other person advancing money upon the shares would have been.

If A. holds property of any kind, simply in trust for B., A. has no right to sell or mortgage the property without the consent of B. It is otherwise, of course, if the terms of the trust authorize A. to deal with the property, but here there is no evidence of any such authority, and Mrs. Amelia Johnston had no more right, so far as appears, to mortgage these shares,



than if they had stood in the name of her children instead of in her name, in trust for them.

It is argued that the company by sec. 53 of ch. 205 R.S.O. 1897, was entitled to disregard the trusts of which it had notice as attaching to these shares, but I do not so understand the meaning of that provision.

The section relieves the company from the duty of seeing to the execution of any trust, to which any shares are subject, and enables it to pay money to a shareholder, who holds shares upon any trust without seeing that the money is properly dealt with by the shareholder after receiving it; but it goes no farther. It does not entitle the company to lend money to A. with express notice that he is a mere trustee for B.: *The Bank of Montreal v. Sweeny* (1887), 12 App. Cas. 617; *Simpson v. Molsons Bank*, [1895] A.C. 270; *The London and Canadian Loan and Agency Co. v. Duggan*, [1893] A.C. 506; *Great Eastern R.W. Co. v. Turner* (1872), L.R. 8 Ch. 149.

The result is that the only shares which passed by the mortgage of July, 1897, to the company were the six shares of permanent stock class A.

The company claim a right to consolidate their two mortgages against the defendant, Anna K. Johnston, in whom the equity of redemption in the land mortgaged to them is vested; but they cannot consolidate them against her, because they have not shewn any notice to her at the time she acquired the equity of redemption in the land, that any other mortgage existed in the hands of the company. She is a purchaser for value of the land without notice of any other incumbrance, and her title cannot be made subject to a debt of which she was not aware when she purchased, so far as the evidence shews: *Stark v. Reid* (1895), 26 O.R. 257.

The plaintiffs accepted the arrears due upon the mortgage upon the land, when the defendant Anna K. Johnston paid them into Court in this action.

The present appeal must be allowed with costs, and the action will be dismissed, as against the defendants, Frank K. Johnston and Anna K. Johnston, with costs since the date of the payment into Court; and the plaintiff will be entitled to tax against the defendant, Anna K. Johnston, one-half his costs

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of the action to that date, the action being treated for the purpose of such taxation, as if it had been brought only against Amelia Johnston and Anna K. Johnston.

There will be a declaration that the plaintiffs have no right to consolidate. The plaintiffs are entitled to a personal order against Amelia Johnston for payment of the balance of the debt secured by the mortgage of July, 1897, and costs, and to the usual judgment for foreclosure in default of payment.

I should add that the examination for discovery of Amelia Johnston is not evidence against Anna K. Johnston.

G. A. B.

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[DIVISIONAL COURT].

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March 13.

*Summary Conviction—Time for Laying Information—Limitation—R.S.O. 1897, ch. 90, sec. 2—Criminal Code, sec. 841.*

The Ontario Summary Convictions Act, R.S.O. 1897, ch. 90, sec. 2, has the effect of incorporating sec. 841 of the Criminal Code, and therefore, in the case of an offence punishable on summary conviction, if no time is specially limited for making any complaint or laying any information under the Act or law relating to the particular case, the complaint must be made or the information laid within six months from the time the matter arose.

THIS was a motion to make absolute an order *nisi* to quash a conviction of the defendant, dated November 2nd, 1901, for that in the month of April, 1900, at the town of Durham, he did erect, put up and place on lot 11 on the west side of Garafraxa street, within the area of fire limits established by by-law 336 of the town of Durham, a frame or wooden building.

One of the grounds upon which the motion to quash the conviction was based was that the information was not laid within six months after the offence complained of, if any, was committed, as required by the statute on that behalf, and that the proceedings were, therefore, irregular and void.

The matter was argued on March 13th, 1902, before MEREDITH, C.J.C.P., and MACMAHON and LOUNT, JJ.

N. W. Rowell, for the defendant, raised the above objection, and referred to sec. 841 of the Criminal Code, 55-56 Vict. ch. 29 (D.), and R.S.O. 1897, ch. 90, sec. 2, incorporating that provision.

W. R. Riddell, K.C., for the prosecutor, contended that there was no limitation of time in laying an information unless such was laid down in the by-law authorizing it, or in some statute under which such by-law was passed: that R.S.O. 1897, ch. 90, sec. 2, only dealt with the kind of proceedings to be taken, and not with the time within which they were to be taken; that it only covered the procedure and not the limitation of time. [MEREDITH, C.J.: The limitation of time is part of the procedure.]

*Per Curiam.* We think the objection as to the time of laying the information is fatal to the conviction. It is quite true that R.S.O. 1897, ch. 90, sec. 2, which we think incorporates sec. 841 of the Criminal Code, might have been better phrased, but looking at the state of the law at the time of the passing of the original of R.S.O. 1897, ch. 90, sec. 2, namely, 38 Vict. ch. 4, sec. 3, and the provisions of the laws then existing, we get some light on the matter. C.S.C. ch. 103, which by sec. 26 provided that informations should be laid within three months, was repealed, and in order to prevent anomalies from a different law applying to summary proceedings under Ontario Acts, from that which applied to proceedings under Dominion Acts, the Ontario Legislature adopted Dominion legislation. If Mr. Riddell is right there would be now no limitation at all. We can hardly think the Legislature intended this, when its policy throughout has been to prescribe a short limitation of time within which the information may be laid. The language used may be so read as to carry out what seems to have been the intention of the Legislature. It may be read to cover the time within which the information is to be laid; we may say this comes within "like proceedings." Then there are also the other words, "otherwise in respect thereof."

Conviction quashed without costs. Usual protection of the magistrate.

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## [IN CHAMBERS.]

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## IN THE MATTER OF THE ESTATE OF T. W. DUNCOMBE.

Feb. 24.

*Will—Construction—“Including” — Estate—Policies of Insurance—R.S.O. 1897, ch. 203, sec. 2, sub-sec. 36, sec. 159.*

A testator bequeathed to his wife one-half his estate “including policies of insurance made payable to her upon my death.” He left three policies on his life, one expressed to be payable to his wife, the second expressed to be “for the benefit of his wife . . . the beneficiary” and providing for payment to his wife as beneficiary, of an annuity of \$250, for twenty years, and the third payable at his death to “his legal heirs.” The widow was the legal heir:—

*Held*, that the third policy formed part of the testator’s estate, but not the first two, for by them a trust was created in favour of his wife as a preferred beneficiary, and so remained until the testator’s death.

*Held*, also, that the word “including” imported addition, that is indicated something in addition to and not to be included in the half of his estate.

THIS was a motion on an originating notice for the construction of the will of Thomas Wallace Duncombe under the circumstances set out in the judgment, and was argued before LOUNT, J., in Chambers, on December 6th, 1901.

*W. A. Wilson*, for the executors.

*J. M. Clark*, K.C., for Mary Duncombe.

*J. R. Cartwright*, K.C., for the Attorney-General.

*A. M. Stewart*, for the official guardian.

*M. F. Muir*, for a legatee, and representing a class.

The following were referred to: *Brainard v. Darling* (1882), 132 Mass. 218; Stroud’s Judicial Dictionary, *sub voce* “Namely.”

February 24. LOUNT, J.:—Motion before me on an originating notice, under Rule 938, for the construction of the fifth clause of the will of Thomas Wallace Duncombe, who died without issue on October 2nd, 1901, leaving him surviving Mary Duncombe, his widow. The will is dated August 8th, 1900; probate was granted on November 7th, 1901.

Three policies of insurance upon the life of the testator are in question.

First, one for \$1000, payable to his wife, Mary Duncombe, at his death, in the Order of Canadian Home Circles;



Second, for \$5000 in the Mutual Life Insurance Company of New York, *for the benefit of his wife, Mary Duncombe, the beneficiary*; providing, however, that at his death an annuity of \$250 per annum for twenty years shall be paid to his wife, *the beneficiary*;

Third, for \$1000, payable at his death *to his legal heirs*, in the Canadian Order of Chosen Friends.

Besides these policies, there are other policies on his life, but they do not come in question here.

The fifth clause reads as follows:—

“I give and bequeath unto my dear wife, Mary Duncombe, my household furniture and one-half of my estate, *including* the policies of insurance made payable to her upon my death.”

On behalf of Mary Duncombe, the legatee's widow, it is contended that the moneys payable under these policies form no part of his estate, that such moneys are payable to her alone, she being the sole and only preferred beneficiary living at the time the will was made or at the time of his death, there being no children, grandchildren, or mother living.

It is also contended in her behalf that the word “including” in the said clause does not in law mean, and was not in fact intended by the testator to mean, that part of his estate comprised in the moneys payable under these policies.

All the other parties before the Court, other than the executors, say the proper construction to place upon the word “including,” as used in the clause is that the moneys payable under these policies form part of his estate, and his widow is entitled to one-half of his estate, the moneys payable under these policies forming part thereof.

Under these circumstances the executors ask for a construction of this clause.

From the best consideration I have been able to give to the matter, I am of the opinion that the third policy mentioned—the one for \$1000 in the Canadian Order of Chosen Friends—forms part of his estate, and the moneys payable thereunder when received should go to and form part of his estate. It is payable to *his legal heirs*; it is not payable to her as a preferred beneficiary by name, nor to her as a preferred beneficiary by the designation of *legal heirs*; nor was it, in my opinion, by the testator so intended.

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The Insurance Act, R.S.O. 1897, ch. 203, sec. 2, sub-sec. 36, defines *legal heirs* or *lawful heirs* to mean and include the wife or husband, if surviving the assured, but I do not understand by this that a policy payable to one thus described is payable to one classed as a preferred beneficiary. Sub-section 2, immediately preceding, is the one dealing with preferred beneficiaries; it names the preferred beneficiaries to be the husband, wife, children, grandchildren, and mother of the assured; all other beneficiaries are known as ordinary beneficiaries.

By sec. 159 of the Act, when the assured by the contract of insurance or by other means therein mentioned, declares the insurance money to be for the benefit of the wife of the assured, then such contract shall, subject to the right of the assured to apportion or alter, create a trust in favour of the beneficiary; and so long as the trust remains, the money payable under the contract shall not be subject to the control of the assured, or form part of his estate when the sum secured by the contract becomes payable.

Here, as to the two first policies, a trust was created in favour of his wife, a preferred beneficiary. This trust remained in her favour up to his death; it was not altered or changed—in fact it could not be altered or changed, as the testator at the time he created the trust had no children, grandchildren, or mother living, and therefore the moneys payable under these two policies were not subject to his control and formed no part of his estate. At his death the moneys payable under these policies were and now are payable to her alone, and are no part of his estate.

The 160th section of the Act has no application to this case; there were no preferred beneficiaries other than his wife in existence at the date of these two policies, nor afterwards. He, therefore, had no power to vary or alter the disposition of the moneys payable under these policies, for by this section his power is only to change or vary the disposition of moneys when an apportionment had already been made, and then only as to the preferred beneficiaries. There being in existence no preferred beneficiaries other than his wife, he could not alter or

vary the apportionment he had already made, nor destroy the trust already created in her favour.

It is further contended by her that the proper construction to give to the word "including" in clause five imports addition, *i.e.*, indicates something not to be included. I am of the opinion this is the proper interpretation to give to the word as used in this clause.

Jarman on Wills, 5th ed., vol. 2, p. 1090, in defining the meaning of the words "namely" and "including," says: "'Namely' imports interpretation, *i.e.*, indicates what is included in the previous term, but 'including' imports addition, *i.e.*, indicates something not included;" and in Stroud's Judicial Dictionary, p. 493, under the title "namely," the same definition is given. It says: "'Including' imports addition, *i.e.*, indicates something not included." This, I think, is the proper interpretation to be given to the word "including" as used in this clause.

I do not think it can be fairly argued that the testator had in mind, when considering this clause, that he was giving or intending to give to his wife that which he had already secured to her by the policies.

The other parties to this matter whose interests are in common, as opposed to this construction, contend on the other hand that it was the intention of this testator to place the money payable under these policies back again into his estate, and make it a condition that his wife should release her claim as a preferred beneficiary, and accept under the will as thus construed, and that the word "including" is evidence of this. I cannot agree with this contention; it would be reading into the will a meaning which, in my judgment, was never intended.

Judgment will therefore be declaring that as to the moneys payable under the policy or certificate of "The Canadian Order of Chosen Friends," it forms part of the estate of the testator; as to the moneys payable under the policy of "The Mutual Life Insurance Company of New York" and under the policy or certificate of "The Order of Canadian Home Circles," these moneys form no part of the testator's estate.

I give costs to all parties out of the said estate.

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[IN CHAMBERS.]

1902

PENNINGTON V. MORLEY ET AL.

April 10.

*Mechanic's Lien—Action Begun by Statement of Claim—Service out of Ontario—Jurisdiction to Allow.*

There is no authority in the Courts of this Province to allow service out of Ontario of a statement of claim filed as the initial step in an action.

*In re Busfield—Whaley v. Busfield* (1886), 32 Ch. D. 123, followed.

Such service is not a matter of practice, but of jurisdiction, and Rule 3 does not enable the Court to apply the analogous procedure as to writs of summons.

*Semble*, that if there were power to allow service of such a statement out of Ontario, it could not be allowed *nunc pro tunc* after it had been effected without an order.

Service out of Ontario of a statement of claim, the initial proceeding in an action to enforce a mechanic's lien, under R.S.O. 1897, ch. 153, upon foreigners resident in a foreign country, and all subsequent proceedings, set aside.

History of the legislation in Ontario as to service out of the jurisdiction.

THIS was an application by the defendants Crosby and Nordyke in an action to enforce a mechanic's lien, which was commenced by filing a statement of claim pursuant to sec. 31 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. 1897, ch. 153, to set aside as against them the judgment pronounced after the trial of the action before the senior Judge of the county court of the county of Essex, and all proceedings subsequent to the filing of the statement of claim, upon the ground that the statement of claim was improperly served upon the applicants out of the jurisdiction, and that, even if service out of the jurisdiction might have been allowed, no order allowing that mode of service was made. The facts are stated in the judgment.

The application was heard by MEREDITH, C.J.C.P., in Chambers, on the 24th January, 1902.

*J. H. Moss*, for the applicants.

*W. M. Douglas*, K.C., for the plaintiff.

April 10. MEREDITH, C.J.:—The applicants are not British subjects, and are residents of the State of Michigan, one of the United States of America, and it is contended on their behalf that, as there is not, as is argued, any statutory authority



conferred upon the Court to permit service of a statement of claim to be effected out of the jurisdiction, the service which was effected on the applicants in the State of Michigan, which was the only service which was effected upon them, was a void proceeding, and that there is no power in the Court to allow such a service, and, secondly, that, even if the Court had jurisdiction to allow service of such a proceeding to be effected out of the jurisdiction, no order was obtained allowing the plaintiffs to effect service in that way, and the service was therefore an entirely nugatory proceeding.

It is not open to question that the Courts of this Province have no inherent jurisdiction to allow service of any proceeding to be effected out of Ontario, and that jurisdiction for that purpose must be conferred by statutory authority.

It is also equally clear that under the English Judicature Act and Rules the provisions for allowing service out of the jurisdiction form a complete code of procedure, and that the English Courts have no jurisdiction to allow service out of England except in cases which come within those provisions, and therefore that service of a statement of claim filed as the initial step in an action may not be so served, it not being mentioned as one of the proceedings which the Court may allow to be served out of its jurisdiction: *In re Busfield—Whaley v. Busfield* (1886), 32 Ch. D. 123: and there are numerous cases in England to the same effect; see also *Re Confederation Life Association and Cordingly* (1899), 19 P.R. 16, (1900), *ib.* 89.

It follows that, unless our Judicature Act and Rules differ from those of England, there is no authority in the Courts of this Province to allow service out of Ontario of a statement of claim filed as the initial step in an action.

It was argued by Mr. Douglas that Con. Rule 3 \* has the effect of making the provisions of the Rules as to service of the writ of summons applicable to service of any proceeding by which an action is commenced.

That Rule, however, is limited to matters of practice, and does not therefore help the respondents, the matter in question

\* 3. As to all matters not provided for in these Rules, the practice, as far as may be, shall be regulated by analogy thereto.

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here not being one of practice, but of jurisdiction: *Attorney-General v. Sillem* (1864), 10 H.L. Cas. 704; *In re Anglo-African Steamship Co.* (1886), 32 Ch. D. 348.

When the Ontario Judicature Act was passed the jurisdiction of the Court to allow service out of the Province depended on the provisions of R.S.O. 1877, ch. 40, secs. 93 and 94, which applied to the Court of Chancery, and R.S.O. 1877, ch. 50, secs. 49 and 50, which applied to the Superior Courts of Common Law.

By the Judicature Act, the High Court of Justice for Ontario was given all the jurisdiction which at the time of the commencement of the Act was vested in or capable of being exercised by the Court of Queen's Bench, the Court of Chancery, and the Court of Common Pleas, as well as of certain other Courts not necessary to be mentioned.

Among the Rules of Court enacted by the Judicature Act were those comprised in Order VII., which dealt with service out of Ontario. These Rules related only to service of a writ of summons or notice of a writ of summons, which the Court or a Judge was given jurisdiction to allow in certain prescribed cases, though by Rule 3 of the Order (Marg. Rule 47) it was provided as follows:—

“3. The preceding Rules of this Order are not intended to interfere with or affect the powers of the High Court, or a Judge thereof in the exercise of the jurisdiction heretofore possessed by any or either of the courts hereby consolidated, to direct on application in that behalf, that service in any other manner may be good service, or that the time for defending shall be other than the time above named, or to give any special or other direction as respects proceeding against a defendant out of Ontario.”

It will be observed, on referring to sec. 93 of ch. 40 of the R.S.O. 1877, that the jurisdiction conferred by it on the Court of Chancery is much wider than that conferred by Order VII.—sec. 93 permitting service out of the jurisdiction not only of a copy of a bill but of any proceeding, and not limiting in any way the cases in which service might be so effected.

The provisions of R.S.O. 1877, to which reference has been made, were not repealed by the Judicature Act, except in so far as they were inconsistent with it: sec. 90, sub-sec. 2.

Next came the revision of the statutes in 1887, by which, apparently in anticipation of the Consolidated Rules, which were then being prepared, coming into force simultaneously with the Revised Statutes, the whole of chs. 40 and 50 of the R.S.O. 1877, except three sections of the latter not material to the present inquiry, and the whole of the Ontario Judicature Act, 1881, except secs. 6, 7, 8, 57 and 90 (1), also not material, were repealed.

In order to meet the difficulty which would have arisen from this repeal, Rules of Court were passed on the 31st December, 1887, the 30th January, 1888, and the 29th February, 1888, by which all matters of practice and procedure affected by the repealed Acts were kept in force until the 1st April, 1888.

By Rule 2 of the Consolidated Rules of 1888, all Rules and Orders theretofore passed by any of the Superior Courts of law or equity in Ontario or Upper Canada and not included in the Consolidated Rules, except certain of them mentioned in a schedule, which do not affect the question under consideration, were repealed, and all practice inconsistent with the Rules was superseded, and provision was made that as to all matters not provided for by the Rules the practice, as far as might be, should be regulated by analogy to the Rules.

Service out of Ontario was dealt with by Rules 271 to 274 inclusive.

Rule 271 provided that service out of the jurisdiction of a writ of summons or notice of a writ of summons *or other document by which a matter or proceeding is commenced*, in certain named cases, might be allowed by the Court or a Judge.

Rule 272 provided as to how notice of writ of summons should be served.

Rule 273 re-enacted in substance sec. 94 of R.S.O. 1877, ch. 40.

Rule 274 re-enacted sec. 93 of the same Revised Statute, modifying it however so as to confine its application to the proceedings mentioned in Rule 271.

Rule 271 was repealed in 1894 by Rule 1309, and a new Rule was substituted for it, and later on in the same year Rule 274 was rescinded by Rule 1383.

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Service out of Ontario is dealt with by the existing Consolidated Rules in Rules 162 to 167, inclusive.

These Rules embody substantially the provisions which were substituted by the former Con. Rule 1309 for Rule 271, and Rules 272 and 273, already referred to.

It will be seen from an examination of these Rules that they do not extend, in terms at all events, to service of a statement of claim such as that the service of which is in question here, although the Rules which were replaced by them made provision for allowing service, not only of a writ of summons and notice of a writ, but also of any other document by which a matter or proceeding is commenced.

The Ontario Judicature Act, 1881, as I have said, gave to the High Court of Justice the jurisdiction which at the commencement of that Act was vested in or capable of being exercised by, among other Courts, the Court of Queen's Bench, the Court of Chancery, and the Court of Common Pleas (sec. 9), and therefore the jurisdiction to allow service out of Ontario, conferred by R.S.O. 1877, ch. 40, secs. 93 and 94, and ch. 50, secs. 49 and 50, was vested in the High Court of Justice.

I was at one time inclined to think that the effect of this was to make the English cases to which I have referred inapplicable here, but the reasoning which led to the decision in *In re Busfield* is opposed to that view, and I am therefore of opinion that I must hold that our Judicature Act and Consolidated Rules form a complete code on the subject of service out of the jurisdiction, and that the Court had no jurisdiction to allow service of the statement of claim to be effected upon the applicants out of Ontario.

Even if I had been of different opinion, an order allowing service out of Ontario not having been obtained, I should have held that the service which was effected was nugatory, and that the Judge had no power to allow service *nunc pro tunc*, as he assumed to do.

The result is, that, in my opinion, the application must be granted, and the service of the statement of claim upon the applicants and all subsequent proceedings as against them must be set aside, and the respondent must pay the costs here and below.



I have referred at greater length than was necessary for the decision of this case, to the history of the legislation in this Province as to service out of the jurisdiction, for the purpose of calling attention to what appears to me to be a defect in the law in that no provision is made for service out of the jurisdiction of the initial proceeding in an action, unless that proceeding is a writ of summons or a notice in lieu of a writ of summons.

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THE TORONTO GENERAL TRUSTS CORPORATION

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March 13.

*Arbitration and Award—Valuation of Buildings—Extension of Time for Making Award—Interest.*

By a lease for years it was provided that the buildings should be valued at the end of the term by three valuers or arbitrators whose award should be made within the six months next preceding 1st November, 1900, and the value paid by the lessor within six months from that date with interest at seven per cent. from such date.

Valuers or arbitrators were duly appointed and possession was given by the lessees on the last day of the term, but the award was not made until about a year afterwards, the time for making it having been duly extended:—

*Held*, that the lessees were entitled to interest at seven per cent. on the value of the buildings, as ascertained by the award, from 1st November, 1900.

Judgment of McMahon, J., reversed.

THIS was an appeal by the plaintiffs from a judgment of MacMahon, J., upon a special case. The facts are set out in the judgments.

The appeal was argued on February 10th, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and BRITTON, J.

*Frank E. Hodgins*, for the appeal. The Judge below erred in assuming that the premises remained vacant after the expiry of the lease, and that the defendants had lost the rent and were asked to pay the interest as well. It was not the fact, that the

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premises remained vacant, nor was it one agreed on in the special case; but in any event, that should make no difference. The position at the end of the lease was that the buildings had passed to the landlord, and the tenant was entitled then to their value in money, and to interest while he waited for the money: *Meux v. Jacobs* (1875), L.R. 7 H.L. at p. 490. The lessor was entitled to and took possession; the lessee should get the value as settled: *Re Macpherson and The City of Toronto* (1895), 26 O.R. 558; *Marsh v. Jones* (1889), 40 Ch. D. 563; *Rhys v. Dare Valley R.W. Co.* (1874), L.R. 1 Eq. 93; *Ballard v. Shutt* (1880), 15 Ch. D. 122; *Birch v. Joy* (1852), 3 H.L.C. 565, at pp. 590, 591; *In re Prittie and Toronto* (1892), 19 A.R. 503; *The Queen v. Murray* (1896), 5 Ex. C. R. 69. The effect of the enlargements of the time for making the award did not destroy the terms of the agreement: *Tyler v. Jones* (1824), 3 B. & C. 144; *Clarke v. Crofts* (1827), 4 Bing. 143; *Benwell v. Hinxman* (1835), 1 C. M. & R. 935; *Oakes v. The City of Halifax* (1879), 4 S.C.R. 640.

*Laidlaw, K.C., contra.* This was a special case, stated by consent, and it cannot now be altered or modified by an affidavit, on appeal: *Holmsted & Langton*, 2nd ed., p. 551. The buildings were in fact vacant during the greater portion of the time between the expiry of the term and the making of the award, and both the plaintiffs and the valuers objected to any change in the premises, until the valuation should be made. Their occupation was not material, as the landlord was entitled to possession and was only liable to pay the value of the buildings if it had been ascertained before November 1st, 1900, and if they had not consented to enlarge the time, they would not have been liable to pay for the buildings. The delay was the fault of the arbitrators, not of the defendants. There is no power to allow interest as damages here, as it is not a case of expropriating land or delay in completing a contract for the sale of land at a certain price, and the cases cited do not apply, and no interest can be allowed on a sum of money until after the amount is ascertained. The whole question is, whether the covenant creates a liability to pay interest from November 1st, 1900, and that is covered by the last clause of the judgment in appeal, which is right: "The foundation of the right to interest

is the award, and the legal rate of interest can only be claimed from its publication." *McCullough v. Clemow* (1895), 26 O.R. 467, and cases therein cited.

*Hodgins*, in reply.

March 13. The judgment of the Court was delivered by BRITTON, J.:—An action was brought by the plaintiffs to recover interest upon \$10,000, being the value as found by the valuers of buildings upon defendants' land on 1st November, 1900.

In the action a special case was stated, and the judgment of Mr. Justice MacMahon is as follows:

"Special case stated for the opinion of the Court.

The plaintiffs are executors of the estate of Charles Potter, deceased, lessee named in a lease between George H. White and the defendant, Elizabeth White, and the said Charles Potter, dated 1st November, 1879; and the defendants are trustees of the estate of the late George H. White: the said Elizabeth White being also personally interested.

The lease, which is for a term of twenty-one years, provides: 'that all the buildings and improvements, now or hereafter to be erected and made on the said demised premises and standing and being thereon, at the end of the said term . . . be valued by three indifferent persons, the award of any two to be valid and binding on the parties hereto,' etc.

'And it is further agreed, that the said reference shall be made and entered upon, and the award made between the said parties, within the six months next preceding the first day of November, one thousand nine hundred. And that within six months from the said first day of November, one thousand nine hundred, the value of the said buildings and improvements found by the said arbitrators shall be paid with interest, at the rate of seven per cent. per annum, from the said first day of November, one thousand nine hundred.'

Arbitrators were duly appointed pursuant to the provisions of the said lease, before the 1st of November, 1900.

The parties on the 23rd of October, 1900, entered into the following agreement: 'That the time aforesaid, namely, the first day of November, 1900, shall be extended until the first

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day of December, 1900, and until such further day, as the said persons to be chosen as aforesaid or a majority of them, may by writing under their hands extend the same.'

The arbitrators duly extended the time for making their award to the 30th of November, 1901, just prior to which date the arbitrators made and published their award.

On the 31st of October, 1900, the plaintiffs gave up possession of the demised premises and of the buildings and improvements thereon to the defendants.

The question to be decided is whether the plaintiffs are entitled to interest on the amount of the award at the rate of seven per cent. per annum from the first November, 1900, until the making of the said award or valuation, or if not then, for what period between first November, 1900, and the making of the award or valuation aforesaid, if any, and at what rate of interest, if any.

According to the arbitration clauses in the lease, the valuation of the buildings was to take place and the award made prior to the 1st of November, 1900, at which date the term demised ended.

Now, supposing the clause giving the lessors (the defendants) the option of postponing payment of the amount awarded for six months from the 1st of November, 1900, had not been inserted in the lease, and the award had been made on the 31st of October, 1900, the sum awarded, together with legal interest, would have been payable from that date. If, however, the award was not made by that date, and the parties had not agreed to extend the time for making the award, the plaintiffs on applying to the Court or a Judge could have obtained an order enlarging the time, and such order would have the same effect as an enlargement by the parties (*per* Blackburn, J., in *Lord v. Lee* (1868), L.R. 3 Q.B., pp. 409-410); and an amount found by an award made during such extended time would be payable from the date of its publication, from which time it would bear interest at the legal rate.

The clause in the lease giving to the lessors the option to postpone payment of the amount of the award for six months after the 1st of November, 1900—they paying 7 per cent. interest—was for their benefit, and they could take advantage



of it or not, as to them seemed meet. The right to exercise the option never arose, the award not having been made before the 1st of November, 1900. And their right to exercise any option ceased to exist unless created by a new contract between the parties.

The clause of the contract as to the option was, as I have stated, clearly for the benefit of the defendants, and it is now sought to be invoked to their detriment. For if the plaintiffs' contention were to prevail, then in the event of the premises remaining vacant from the delivery of possession to the defendants on the termination of the lease on the 31st of October, 1900, until the date of the award (which I understand is the case here), the defendants would not only be losing the rent, but would be paying interest, which was never contemplated by the parties when the contract was entered into; and which it is now claimed they should pay because of the delay of the arbitrators in making their award. It was not pretended that the delay in making the award was caused by any act of the defendants.

The foundation of the right to interest is the award, and the legal rate of interest can only be claimed by the plaintiffs from the publication of the award.

The plaintiffs must pay the costs of the action and the special case."

It may not make any difference, but it was conceded on the argument that the learned Judge was mistaken in supposing that the premises were vacant from the termination of the lease on 31st October until the date of the valuation or award. They were not so vacant.

With the greatest deference and respect for the opinion of the learned Judge, I regret that I am not able to agree with the conclusion at which he has arrived.

The clause in the lease under consideration distinctly recognizes the buildings on the demised premises as the property of the lessee, to be taken over by the lessors at the expiration of lease, and the value of these buildings, as they stood at the expiration of the lease, was to be paid by the lessors to the lessee. Provision is made in the lease as to when and how this value is to be determined.

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A delay occurred in fixing the value, so that it was not ascertained at the time mentioned in the lease. No one is to blame for this; but, if any blame, it attaches as much to the defendants as to the plaintiffs. This delay in determining value did not in any way postpone the time for or cause delay in the defendants taking possession.

The defendants took possession of the buildings, the equitable ownership of which was in the plaintiffs, on the 1st day of November, 1900, and it was, as can be gathered from the lease, the intention of the parties, that if the lessors did not desire to pay, or if from any cause they could not then pay for the buildings, they were to pay interest at 7 per cent. per annum from 1st day of November, 1900, on the then value of such buildings.

The defendants were then as to these buildings, and under the lease, in the position of purchasers in possession.

The general rule of equity is, that if a purchaser is in possession of an estate, receiving the rents, the purchase money being retained by him, will carry interest to be paid by him to the vendor: *Birch v. Joy*, 3 H.L.C. 565.

In this case, under the lease, the lessors are purchasers of the buildings. The test as to payment of interest seems to me to be the possession. The case is not at all like *McCullough v. Clemon*, 26 O.R. 467.

It is true, that here the value of the buildings is not obtained by a mere arithmetical calculation, but it is determined by persons, and in a way agreed upon, as the value on a particular day, when these buildings and the land on which they stood were taken possession of by the lessors, who, from that time, are the absolute owners and entitled to the rents and profits, be they much or little, and from which time, I think, it was understood by the lessors, that they were to pay interest at the rate of 7 per cent. per annum until payment of amount of award or valuation.

Where the title is not accepted at the time of taking possession, interest is payable on the purchase money from the time of possession.

*In re Pigott and The Great Western R.W. Co.* (1881), 18 Ch. D. 146, is a case where the title was not accepted

until after the award, and where there was delay in taking possession and in depositing the money; and it was held that the company was liable to pay interest, not from the date of award, but from the time when the company might prudently have taken possession. It makes no difference whether possession was profitable or not.

In *Ballard v. Shutt*, 15 Ch. D. 122, no rents or profits were received, but interest was made payable from the date of possession.

In my opinion, the judgment should be reversed with costs, and be entered for the plaintiffs for interest on \$10,000 at 7 per cent. per annum from 1st November, 1900.

Defendants are to pay the costs of the action and of the special case and of the appeal.

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## [DIVISIONAL COURT.]

## FORD v. HODGSON.

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Feb. 13.

*Lien—Vendor's Lien—Timber—Cut and Uncut—Interest in Land—Identification.*

The owner of land by agreement in writing sold the timber on it, removable within three years, taking promissory notes from the purchaser in payment. The purchaser, who was acting as an agent, assigned all his interest in the agreement to his principal and transferred the notes made by his principal to the landowner, who subsequently sold and conveyed the land and all her interest in the timber and notes to the plaintiff. The assignee of the purchaser's rights cut and removed some of the timber from the land and cut and piled on the land a lot of cordwood which he sold to the defendant, but did not pay the notes. The defendant, who had notice of the contract for the sale of the timber and of the non-payment of the price, sought to remove the wood:—

*Held*, that the sale of the timber was that of an interest in land in respect of which the plaintiff was entitled to a vendor's lien for the amount of the notes, which was not displaced by the cutting and sale of the timber so long as it could be identified and remained on the land, and that he was entitled to an injunction.

*Summers v. Cook* (1880), 28 Gr. 179, followed.

THIS was an appeal from the judgment of FALCONBRIDGE, C.J.K.B., in an action for an injunction to restrain the removal of cordwood from the land upon which it had been cut, and for a declaration that the plaintiff had a lien on the cordwood for the amount of promissory notes which had been given in payment therefor.

An injunction had been granted, on the application of the plaintiff, by the local Judge at Lindsay, who delivered the following judgment in which the facts are fully stated:—

February 14. DEAN, Co. J.:—This is a motion to continue an injunction, the matter to stand in all respects as though it had been made before a High Court Judge.

The then owners of the land in question gave a memorandum, in writing in the following words, to one William Edgar:—

“White Lake, Sept. 26th, 1899.

“We have this day sold William Edgar, of Haliburton, all the timber of every kind on lot 23 in first concession of Snowdon, and on lot one of first concession of Glamorgan, in the county of Haliburton, for the sum of \$400; one hundred he has now paid, and his notes at six, twelve and eighteen months for \$100 each, with interest at 6 per cent. till paid, to be endorsed by Mr. Shaver. We give them three years from this to remove



the timber, but it is now at their risk, so they be careful of damage by fire. Any taxes or otherwise, against said timber, if paid by him, shall be deducted from these notes.

“(Signed) H. C. St. George,

“(for Miss Georgie St. George).

“(Signed) Richard Scott.

“Possession now given.

“(Signed) R. Scott,

“(Signed) H. C. St. George.

“The timber I give over to Mr. Shaver, I having purchased it for him.

“(Signed) Wm. Edgar.”

The \$100 was paid down, which went to Scott for his share in the timber, together with the first note.

On the 28th of November, 1900, the plaintiff purchased the lands, taking a statutory deed. On the 22nd of January, 1901, Miss St. George executed a deed to the plaintiff which, after reciting, among other things, that it was intended to grant and convey by said statutory deed to the plaintiff all the interest which she then had in or to the trees, timber, saw logs, cordwood, and all other the products of any trees or timber at the date of the said statutory deed, lying or being upon the said lands, and all the rights of her thereto, but by inadvertence the same was not carried out and that this deed was given for the purpose of so doing, it goes on to convey and assign the same and all her interest, claim or demand, whether by way of vendor's lien or otherwise, to the plaintiff; it also assigns to him the two promissory notes “being part of the indebtedness for unpaid purchase money and all benefits and advantages to be derived therefrom.”

Miss St. George and the plaintiff attest the accuracy of these statements by their affidavits filed herein. The effect of the deed and of this assignment is to vest in the plaintiff all property, rights and liens which the original owner had in said lands, wood and timber.

The last two notes have not been paid. A large quantity of wood was removed from the premises by Edgar and Shaver: a further large number of trees have been felled and cut into cordwood, and the defendant, who purchased this last mentioned

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cordwood from Shaver, has lately proceeded to draw the same away.

An injunction was issued on behalf of plaintiff, who claimed a vendor's lien on the same, which injunction it is now sought to continue until the trial.

For the defendant, *McCarthy v. Oliver* (1864), 14 C.P. 290, was cited. This was an action of replevin for certain square timber manufactured from trees sold, while standing, by the plaintiff to the defendant by parol, which timber, after having been made, was removed by defendant without his having paid for the trees, whereupon the plaintiff replevied the timber.

The judgment of Richards, C.J., begins in these words: "There is no doubt that the sale of standing trees is the sale of an interest in land, and to be good under the Statute of Frauds must be in writing." The judgment of the learned Chief Justice, however, avoids the vendor's lien by the following argument at pp. 293, 294:—

"It appears from the evidence that after the parol agreement, proved at the trial, had been made, the plaintiff passed the place daily where the defendant's men were at work, saw them making the timber and made no objections to their doing so. I think this is evidence to go to a jury that after the trees were cut and had become personal property the plaintiff was willing that defendant should act on the parol agreement from that time forth, and as to the trees after they were cut, or each tree after it was cut, that he was willing that the defendant should take it into his possession and manufacture it into lumber, the price to be paid for each tree being that which had already been agreed upon. I think the plaintiff, if he had desired so to do, could have revoked his license as soon as the defendant had cut a tree, and if defendant remained on plaintiff's lands after that, he would have been a trespasser, and no property in the tree would have passed to plaintiff. But if, after the tree was cut on the parol license, plaintiff allowed defendant to go on and manufacture it into lumber, permitted him to take and continue in possession of it for that purpose and to expend his time and labour or money on it, supposing all the time that plaintiff was willing he should do so on the terms of the original agreement; to allow the plaintiff after this to

resume possession of the timber as his own would be a monstrous injustice, which, in my opinion, the law will not permit."

I think, therefore, we must consider the matter under the evidence the same as if the agreement had been made (after the trees had been cut down) to sell them to the defendant at the price mentioned, to be manufactured into lumber, and that defendant took possession of them on plaintiff's land, and did there make them into lumber. Nothing being said about the time of payment, plaintiff could have retained possession until he was paid, but having given defendant possession of the trees, or what is the same thing, in my view of this case, having permitted him to take such possession without objection, to manufacture them into lumber, without reserving any right to retake them for the unpaid purchase money, or any stipulation that defendant should not take possession until he had paid for them, I think his lien is gone."

The effect of this is that there could be no vendor's lien on standing timber, so sold, unless it was specially stipulated for in the contract or license, and so stipulated for, it would be by virtue of the bargain, and not by the vendor's lien, for no tree could be used or removed as it is cut down. The limbs must be cut off and the trees manufactured into something on the land—timber, or cordwood or cut into saw logs. Something must be done to it, which would require the vendee "to expend his time and labour or money upon it."

If this view of the law is correct and is still binding, the doctrine of vendor's lien is exploded, so far as the sale of standing timber is concerned.

*Mitchell v. McGaffey* (1858), 6 Gr. 361, is very like the case before us in all its facts. Counsel in commenting on this case seemed under the impression that it did not touch the question of restraining the removal from the lands of timber already cut. This is an error, for not only does the headnote say that the plaintiff "was entitled to an injunction to restrain the felling of timber, or the removal of such as had already been cut down," but the bill prayed for both these remedies, and it is plain from the judgment, as reported, that both were granted. I further find a statement by Spragge, C., in *McLean v. Burton* (1876), 24 Gr. 134, at pp. 136, 137, in these words: "In

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*Mitchell v. McGaffey*, in this Court, an order was granted to restrain the cutting down of growing timber and the removal of that already cut."

*Mitchell v. McGaffey* is a most unequivocal authority, not only, that a sale of standing timber to be cut by the purchaser is a sale of an interest in land; but also, that a vendor's lien attaches to the timber, made from the trees when cut, before they are removed from the land. This case does not seem to have been cited in *McCarthy v. Oliver*.

In *McLean v. Burton*, a case directly in point, the Chancellor says, at p. 136: "Then it is said that even if the Court would restrain a mortgagor from cutting, still after severance, and after bestowal of labour in converting growing trees into timber, the Court will not interpose though the timber can be followed; that it has become a chattel and the jurisdiction does not apply." In answer to that contention the Chancellor adds: "The jurisdiction to restrain the removal of the timber wrongfully cut down has been exercised in several cases. . . ." After citing further cases in which it has been done, he continues, at p. 137: "It certainly has been the constant practice of the Court to restrain, in a proper case, not only the further cutting of timber, but the removal of timber already cut," and he held, in the case before him, the plaintiff entitled to an injunction to restrain, not only the further cutting of timber, but the removal of the timber already cut from the place where it was.

*Lavery v. Pursell* (1888), 39 Ch. D. 508, is an authority that the sale of anything attached to the freehold, in that case a house sold to be taken down and removed within two months, is a sale of an interest in land.

In *Summers v. Cook* (1880), 28 Gr. 179, it was held that an agreement to sell standing timber, to be cut and removed by the vendees, was an agreement for the sale of an interest in land; that, *primâ facie*, the vendor was entitled to a lien for unpaid purchase money, and that the circumstance that the timber was purchased for the purpose of being cut down and used at the vendee's mill as soon as possible, did not deprive the vendor of his right to the lien. The vendor was given an injunction to



prevent cutting and removing by the defendants until the balance of the purchase money was paid.

*McNeill v. Haines* (1889), 17 O.R. 479, is to the same effect. It is famous for being the case in which Proudfoot, V.-C., made a recantation of his heresy, that such sales were sales of chattels—though, like many another recantation, it was made in submission to authority, and not from conviction.

To be bound by the vendor's lien, the subsequent purchaser must have had notice of the original contract. The words of the contract shew that the last \$200 of the purchase money was not due at the time the defendant bought the wood. The presumption, in the absence of evidence to the contrary, would be that it had not been paid. It would certainly put the defendant upon inquiry. The defendant can set up title to this wood only through this contract, and he must be assumed to have had notice of all it contained: Addison on Contracts, 9th ed., 739; Sugden's Law of Vendors and Purchasers, 879.

It is contended that the taking the notes is an abandonment of the lien. In Dart's Law of Vendors and Purchasers, 6th ed., at p. 829, it is said: "*Primâ facie*, the taking of a mere personal security for the purchase money *e.g.*, a promissory note or a bill of exchange, even although it be negotiated, or a bond, is not evidence of an intention to abandon the lien; nor will the joining of a surety in a note or bill of exchange make any difference, since these are considered merely as modes of payment." See also the cases therein cited, and *In re Lightoller*, *Ex p. Peake* (1816), 16 Rev. Rep. 233, and *Mitchell v. McGaffey*, 6 Gr. at p. 365.

All the cases above cited, except *Mitchell v. McGaffey*, are subsequent to *McCarthy v. Oliver*, and are overwhelmingly against it.

It is finally contended for the defendant, that admitting for the sake of argument that the plaintiff has a lien, yet there is no case made out for an injunction on the facts; that no irreparable injury is threatened, and that the balance of convenience is not in its favour.

As to the injury, the plaintiff has a lien; if the wood is taken out of his possession, it, the lien, will be clean gone for ever. Could anything be more irreparable? It is said the

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defendant is good for damages. That is no reason why plaintiff should be compelled to forego his present security. Many a man, apparently a thousand times as good as the defendant, has lost everything in less time than will have elapsed before this case can be tried. No one has been able since Locke's time, no more than before it, "to find a nail with which to fasten the wheel of fortune." The plaintiff is satisfied with his security; no one should be allowed to take it away without his consent.

As to the balance of convenience, it is equal either way. The plaintiff is willing that the wood should be drawn to the railway at once. It should go there in the interest of which ever party wins, and when once there, it can neither be delayed nor lost, but it should be kept there until this cause is disposed of.

I have just observed my note of the defendant's contention that the words at the bottom of the contract, "possession now given," are to be construed as meaning that vendors then gave up possession of the timber to the vendees, and so gave up any lien. I think the parties meant that the purchaser would go on at once and cut the timber. Possession was intended to be given in that sense only. There is an instructive passage in the judgment of *Mitchell v. McGaffey*, in which the then Chancellor (Blake), remarking upon certain words used in this contract, says: "The agreement is in the handwriting of the plaintiff, who probably knew nothing of either the principles or language of the law beyond the jargon acquired from the occasional perusal of legal documents; and, did the matter admit of investigation it would be found, I apprehend, that the parties had no notion whatever of the distinction contended for, which they are supposed to have intended to embody in the agreement. Had the real intention been to extinguish the vendor's lien, that might have been expressed distinctly in a single sentence:" p. 366.

The Chancellor used words which I adopt as my own in this case: "But no such intention is to be found in the instrument, and to infer it under such circumstances from the language employed would be, in my opinion, quite unjustifiable:" p. 366.

As to injunction where goods only are involved, see *Shaver v. Gray* (1871), 18 Gr. 419; *Shaw v. The Earl of Jersey* (1879),

4 C.P.D. 120; *Gault v. Murray* (1892), 21 O.R. 458; *Bradley, v. Barber* (1899), 30 O.R. 443.

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The action was tried at Lindsay on May 29th, 1901, before FALCONBRIDGE, C.J.K.B., without a jury.

*R. J. McLaughlin*, for the plaintiff.

*G. H. Hopkins*, for the defendant.

June 11. FALCONBRIDGE, C.J.:—His Honour Judge Dean, in a very careful judgment, dealt with the legal questions involved on a state of facts not differing essentially from those developed at the trial.

His conclusions are, in my humble judgment, correct, and they furnish sufficient reasons for awarding judgment to the plaintiff who will be declared entitled to a lien on the wood for the amount of the unpaid purchase money due to him, under the assignment from Georgina Comber, which amount is represented by the promissory notes given to her, viz., \$200, with interest on \$100 from 29th September, 1900, and on \$100 from 29th March, 1901, with costs of suit, including costs of motion for injunction.

On payment of such sum, with interest and costs, defendant is declared entitled to cut, take, and remove the balance of the timber on lot one in the first concession of Glamorgan, within the time limited by the contract for its removal.

From this judgment, the defendant appealed, and the appeal was argued on the 6th December, 1901, before a Divisional Court composed of BOYD, C., and FERGUSON, J.

*Riddell*, K.C., for the appeal. The evidence shews that the defendant had purchased the cordwood after it was cut, and had paid nearly all his purchase money before the notes matured, and he purchased in complete ignorance of the existence of the agreement. The cordwood became chattels, was merely left there to dry, and there is no vendor's lien. Permission to cut was a parting with the possession, and a loss of the vendor's lien: *McCarthy v. Oliver*, 14 C.P. 290; *Mitchell v. McGaffey*, 6 Gr. 361. In *McLean v. Burton*, 24 Gr. at p. 136, the law laid

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down was that of an action between a mortgagor and a mortgagee, and *Summers v. Cook*, 28 Gr. 179, *per* Blake, V.-C., at p. 183, shews the difference between such a case and this. There the money was due; here there was no default until after the defendant bought the wood, and he had no notice: *Wyatt v. The Bank of Toronto* (1858), 8 C.P. 104, *per* Draper, C.J., at p. 108; *Graham v. Bell* (1865), 11 Gr. 519; *McGregor v. McNeil* (1882), 32 C.P. 538, at p. 544; *Johnston v. Shortreed* (1886), 12 O.R. 633, *per* Wilson, C.J., at p. 635; *McNeill v. Haines*, 17 O.R. 479; *Handy v. Carruthers* (1894), 25 O.R. 279. The payment here was not to be made by Edgar, the purchaser of the timber, but by Shaver, a third party: *DeGear v. Smith* (1865), 11 Gr. 570; *Mathers v. Short* (1868), 14 Gr. 254; 3 Pomeroy's Eq. Jur., sec. 1252; Addison on Contracts, 9th ed., 739; *Bradley v. Barber* (1899), 30 O.R. 443; *McLaren v. Caldwell* (1880), 5 A.R. 363; *Dwyre v. Ottawa* (1898), 25 A.R. 121. The notes were never presented or protested, and if any lien ever did exist, it ceased when the notes matured and the debt became due. The measure of the damage, if any, is the value of the timber before it was cut. The plaintiff's wrongful act in preventing the defendant removing the wood before the plaintiff had acquired a title to the land should not prejudice the defendant.

*R. J. McLaughlin*, contra. The agreement was for the sale of an interest in land, not in chattels. The test is—Does the property in the timber pass while it is attached to the freehold, or not until it is severed? If it passes while attached to the freehold, the same is of an interest in land. In this case, it passes, and, consequently, the sale is of an interest in land: *Summers v. Cook*, 28 Gr. 179; *McNeil v. Haines*, 17 O.R. 479, *per* Proudfoot, V.-C., at p. 490; *Lavery v. Pursell*, 39 Ch. D. at p. 518. The later cases seem to have set towards a return to the general rule, that a contract for the sale of growing timber which is not to be severed immediately is the contract for the sale of an interest in land: *Handy v. Carruthers*, 25 O.R. 279, *per* Street, J., at p. 280. The old cases before 1869 and before *Summers v. Cook*, are not now to be followed. There was a vendor's lien upon the property in the hands of Shaver, which has not been waived or removed, and it remains, as against the



property in the hands of the defendant. A vendor's lien does not arise out of or depend upon the form of the contract. The agreement between Shaver and Hodgson can have no effect on the plaintiff's rights. A purchaser has notice of his vendor's title: *Patman v. Harland* (1881), 17 Ch. D. 353; and the defence of a purchaser for value without notice must be supported by the legal estate: *Snell's Equity Jur.*, 9th ed., 24 and 29; *Mackreth v. Symmons* (1808), 15 Ves. 329; the taking of the notes did not waive the vendor's lien: *Dart's Law of Vendors and Purchasers*, 6th ed., 829; *Mitchell v. McGaffey*, 6 Gr. 361. There being a vendor's lien, it is co-extensive with the sale. If the injunction goes, it must go not only to prevent further cutting, but also to prevent the exercise of any of the rights of the contract: consequently, to prevent removal of timber cut, or the going upon the land in any way.

*Riddell*, in reply. *Wyatt v. The Bank of Toronto*, 8 C.P. 104, and *McCarthy v. Oliver*, 14 C.P. 290, are decisions of the full Court, and will not be reversed here.

February 13. BOYD, C.:—This appeal is concluded by authorities binding upon us in favour of the judgment pronounced at the trial.

The sale of the timber, to be removed in three years by the purchaser, was of an interest in land, and in respect of which a vendor's lien arose by operation of law. This was not displaced by the cutting or sale of the timber, as long as it could be identified and remained on the land.

The remedy is by way of injunction and enforcement of lien on the property so identified, as was held in *Summers v. Cook*, 28 Gr. 179, and the earlier cases therein cited.

I would affirm the judgment, with costs.

FERGUSON, J., concurred.

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## TOWN OF WHITBY V. GRAND TRUNK R.W. CO.

April 11.

*Railway—Statutory Obligation — Enforcement by Municipality — Prohibition against Removal of “Workshops”—Breach—Damages—Amendment.*

Upon a motion made by the plaintiffs, pursuant to leave given in the judgment reported in 1 O.L.R. 480, for leave to amend by claiming a remedy against the defendants by virtue of the prohibition contained in sec. 37 of 45 Vict. ch. 67 (O.), providing that “the workshops now existing at the town of Whitby, on the Whitby section, shall not be removed by the consolidated company (the Midland Railway Company of Canada) without the consent of the council of the corporation of the said town :”—

*Held*, that this section imposed an obligation upon the Midland Railway Company of Canada for the benefit of the plaintiffs, who were entitled to maintain an action thereon in their own name; and by virtue of 56 Vict. ch. 47 (D.), amalgamating the Midland Company with the defendants, and cl. 3 of the agreement in the schedule to that Act, the plaintiffs could maintain an action against the defendants for damages for any breach of the obligation committed by the Midland Railway Company before, or by the defendants since, the amalgamation; and the plaintiffs should be allowed to amend and to have judgment for such damages as they were entitled to.

*Held*, also, that “the workshops now existing” meant the buildings used as workshops; and damages could not be assessed on the basis of the prohibition being against the shutting down of or reducing the extent of the work carried on in the workshops.

MOTION by the plaintiffs, pursuant to leave given in the judgment of this Court (1 O.L.R. 480), for leave to amend the statement of claim by claiming a remedy against the defendants by virtue of the prohibition contained in sec. 37 of 45 Vict. ch. 67 (O.), providing that “the workshops now existing at the town of Whitby, on the Whitby section, shall not be removed by the consolidated company (the Midland Railway Company of Canada) without the consent of the council of the corporation of the said town of Whitby.”

The motion was heard by ARMOUR, C.J.O., MACLENNAN, MOSS, and LISTER, J.J.A., on the 2nd December, 1901.

A. B. Aylesworth, K.C., and J. E. Farewell, K.C., for the plaintiffs.

W. Cassels, K.C., for the defendants.

April 11. ARMOUR, C.J.O.:—The plaintiffs applied, on notice to the defendants, for leave to amend by claiming a remedy against the defendants by virtue of the prohibition

contained in sec. 37 of the Act 45 Vict. ch. 67 (O.), in pursuance of the leave granted by us in our judgment in this case, reported in 1 O.L.R. 480.

Section 37 of the Act 45 Vict. ch. 67 provides that "the workshops now existing at the town of Whitby, on the Whitby section, shall not be removed by the consolidated company without the consent of the corporation of the said town of Whitby."

This section imposes an obligation upon the Midland Railway of Canada, it being "the consolidated company," for the benefit of the plaintiffs, and the plaintiffs are entitled to maintain an action thereon in their own name: *Mayor, etc., of Devonport v. Plymouth, Devonport, and District Tramways Co.* (1884), 52 L.T.N.S. 161.

By the Act 56 Vict. ch. 47 (D.), amalgamating or consolidating the Midland Railway of Canada and other railway companies with the Grand Trunk Railway of Canada, and by cl. 3 of the agreement in the schedule to that Act contained and made part of that Act, it is provided "that the united company shall be invested with and shall have all the rights, powers and property, and be responsible for all the liabilities of the said the Grand Trunk and of the said several companies parties to these presents"—of which the Midland Railway of Canada was one—"other than the Grand Trunk, and any right, lien, engagement or claim which could be enforced by or against either the Grand Trunk or any other of the said several parties hereto, may on and after the date of union be enforced by or against the said the united company."

The effect of this clause is, that the plaintiffs are entitled to maintain an action against the defendants for the damages sustained by them by any breach of the said obligation committed by the Midland Railway of Canada before the amalgamation or consolidation of it with the defendants, and by any breach of the said obligation committed by the defendants since the amalgamation or consolidation.

The Act 45 Vict. ch. 67, which contains this obligation, was passed on the 10th day of March, 1882; and the contention was, that the word "workshops," as used therein, should be held to mean not only the buildings used as workshops, but the

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work necessary to be done for the Whitby section of the consolidated railway, and the men necessary to be employed for the doing of such work, treating the word "workshops" as meaning a going concern for doing, and doing therein, the work required to be done for that section by the men necessary to be employed for that purpose.

But I do not think that any such wide signification can be attached to the word "workshops," as used therein, without something shewing what, if any, work was to be done therein, and how many, if any, men were to be employed therein.

The words are "the workshops now existing;" and these words, so used, cannot, in my opinion, be construed to mean more than the buildings used as workshops.

These buildings were removed from time to time, partly by the Midland Railway of Canada before its amalgamation with the defendants, and partly by the defendants since the amalgamation.

And for these breaches of this obligation the plaintiffs are entitled to be compensated in damages by the defendants.

And the damages must be such as may fairly and reasonably be considered as arising naturally from such breaches.

And these damages would be the loss of taxes, if any, which the plaintiffs have sustained and will sustain, while the buildings would last, by reason of their removal.

I say "while the buildings would last," because in time they would cease to exist by reason of decay, and the defendants were not bound to rebuild, renew, or repair them.

These damages can be readily ascertained by taking the assessed value of the real property in 1882 as a basis.

The plaintiffs may, therefore, amend in accordance with the views expressed, and may have a reference to the Master at Whitby to ascertain their damages, electing to do so within one month; and, if they do not so elect, the action will be dismissed with costs, but, if they do so elect, they must pay the costs up to and including this judgment, and further directions and the costs of the reference will be reserved.

MACLENNAN, J.A.:—I think the defendants are bound by the obligation imposed by sec. 37 of the Act 45 Vict. ch. 67



upon the Midland Railway Company of Canada, that the workshops at the time of the passing of the Act existing at the town of Whitby, should not be removed by that company without the consent of the council of the town of Whitby.

That Act was passed on the 10th March, 1882, and it seems that the buildings have been removed partly before the amalgamation of the Midland Company with the defendant company in 1893, and partly afterwards.

Whatever may have been intended by the plaintiffs in procuring the insertion of this section in the Act, we cannot construe it otherwise than according to the plain meaning of the language employed. The "workshops" can only mean one thing, namely, the buildings then used by the company for doing their work. The company might cease to use them, and leave them to decay; they might be burned down by accident. The covenant is merely that they shall not be removed by the company. That covenant has been broken, and whatever damage, if any, the plaintiffs have sustained by that removal, they are entitled to recover. If the shops were within the town limits, their removal may have caused a loss of taxes, by a reduction of the taxable value of the land on which they stood, but I am clear that no damages should be recovered for the discontinuance of work and of the employment of men in the shops.

I agree in the disposition of the motion indicated by the Chief Justice.

Moss, J.A.:—Motion by the plaintiffs for leave to amend, pursuant to leave reserved upon the disposition of the defendants' appeal (1 O.L.R. 480) from the judgment at the trial (32 O.R. 99).

The defendants resist the motion, contending, first, that there is no liability for damages, and secondly, that, if there is a right to sue, no actual damages recoverable by the plaintiffs can be shewn.

The Act 45 Viet. ch. 67 (O.), which created the consolidated company under the name of the Midland Railway of Canada, contains the section upon which the plaintiffs rely. It enacts that "the workshops now existing at the town of Whitby, on

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the Whitby section, shall not be removed by the consolidated company without the consent of the council of the corporation of the said town." It can scarcely be doubted, I apprehend, that if, after assent was given to this Act, the Midland Railway Company was proceeding to tear down and remove the workshops in question, without the consent of the plaintiffs' council, the plaintiffs could have obtained an injunction from the Court restraining such action on the part of the railway company, and that without reference to any question of the extent of damage suffered by the plaintiffs. The plaintiffs' right to that relief rests upon there being a direct breach of an obligation not to attempt to remove the workshops without the plaintiffs' consent. No one can read the provision in question without seeing that it was introduced manifestly for the benefit of the plaintiffs, who desired to protect themselves against the workshops being removed at the sole will of the railway company.

The defendants succeeded to the position of the Midland Company, and assumed and became liable to its obligations. Then, the workshops having been removed partly by the Midland Company and partly by the defendants, no injunction having been sought for or obtained, the plaintiffs are not left without remedy for the breach of the contract. They are entitled to recover such damages as may be shewn to have fairly resulted to them from the breach, and they ought to be allowed to shew them and obtain judgment for them in this action. It is quite probable that the extent of the damages will be much narrower than the plaintiffs contemplated when sec. 37 was enacted. It seems rather unlikely that such a provision should have been made only with a view to preventing comparatively trifling damage to the plaintiffs as a corporation. But it is not possible to give to its language such an extensive meaning as was contended for by the plaintiffs. And, while I think the plaintiffs are entitled to recover, I do not think they can assess their damage upon the basis of the prohibition being against the shutting down of or reducing the extent of the work car d on in the workshops. Some of the bases on which the damages may be ascertained are indicated in *Village of Brussels v. Ronald* (1885), 11 A.R. 605, and *City*

of *St. Thomas v. Credit Valley R.W. Co.* (1888), 15 O.R. 673; but the plaintiffs should not be tied down to these or claims of a similar kind, if there are any others that may appear to be fair and reasonable damages to them as a corporation.

I think the motion should be allowed on the terms indicated by the Chief Justice.

LISTER, J.A., died while the Court had the motion under consideration.

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[IN THE COURT OF APPEAL.]

RENNIE ET AL. V. QUEBEC BANK ET AL.

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April 10.

*Chose in Action—Assignment of—Validity—Notice—Bank Act—Statute of Elizabeth—Execution—Interest in Partnership—Sale.*

Action by husband and wife to set aside an assignment to a bank by the husband's execution debtor of his share or interest in the assets and business of a partnership. The assignment was made in February, 1896, as security for a past due debt exceeding the amount of the assignor's interest in the partnership. The husband recovered judgment against the assignor in May, 1896, in an action brought before the assignment, and placed execution in the sheriff's hands in July, 1896. Under that execution, the sheriff, without making any actual seizure of the partnership assets, purported to sell and convey to the wife in October, 1896, all the undivided share or interest of the assignor exigible under execution in the partnership assets or business. This action was begun in November, 1898 :—

*Held*, that the assignment was not invalid under the Bank Act, nor under the Statute of Elizabeth, there being no evidence that it was made with intent to delay and defraud the husband in his action against the assignor.

Under the law as it stood at the date of the assignment, notice thereof to the assignor's partners was not necessary to its validity.

*Per ARMOUR, C.J.O.* :—Debts are not included in the expression "goods, wares, and merchandize," as used in the Bank Act.

The effect of placing the execution in the sheriff's hands was to bind the goods of the partnership, so that they were liable to be seized, but no seizure of any specific assets having been made, and all the assets of the partnership having been sold, realized, and disposed of, the execution creditor lost any benefit which he might have derived from the seizure of specific assets and the sale thereunder of the undivided interest of the execution debtor therein; and nothing passed to the wife by the sale to her.

Judgment of a Divisional Court, 1 O.L.R. 303, affirmed.

THIS was an appeal by the plaintiffs, John Rennie and Margaret Rennie, from the judgment of a Divisional Court (Boyd, C., and Robertson, J.) affirming the judgment of the

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trial Judge (Meredith, C.J.,) dismissing the action, which was brought to set aside an assignment by the defendant Hugo Block to the defendants the Quebec Bank of his interest in the assets and business of the firm of Reid, Taylor, and Bayne, and for other relief.

The facts are stated in the report of the judgments below, 1 O.L.R. 303, and in the present judgments.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 17th and 20th January, 1902.

*J. O'Donohoe*, K.C., and *W. Norris*, for the appellants. The firm of Reid, Taylor, and Bayne was a general partnership, and not a special or limited one. The articles of partnership shew that Block's share was the release of a mortgage and not cash: *Patterson v. Holland* (1858), 6 Gr. 414; *Whitemore v. Macdonell* (1857), 6 C.P. 547; *Watts v. Taft* (1858), 16 U.C.R. 256. Block's interest in the firm was goods, chattels, wares, and merchandize, and could be seized by the sheriff under execution, and was bound from the delivery of the writ to the sheriff: *Glover v. Southern L. & S. Co.* (1901), 1 O.L.R. 59; *Ryall v. Rowles* (1749), 1 Ves. Sr. 348; *Harrison v. Harrison* (1892), 14 P.R. 436; *Partridge v. McIntosh* (1849), 1 Gr. 50; *Wilson v. Vogt* (1865), 24 U.C.R. 635; Stat. of Frauds, 29 Car. II. The assignment dated the 4th February, 1896, was subject to equities, not only equities between the original parties, but all equities, which equities are excluded only by notice of the assignment given by the Quebec Bank to the firm of Reid, Taylor, and Bayne: Mercantile Amendment Act, R.S.O. 1887, ch. 122, secs. 11, 12; *Elliott v. McConnell* (1874), 21 Gr. 276; *Atkinson v. Gallagher* (1876), 23 Gr. 201; *Dearle v. Hall* (1823), 3 Russ. 1; *Wilson v. Kyle* (1880), 28 Gr. 104; *Court v. Holland* (1881), 29 Gr. 19; *Morris v. Livie* (1842), 1 Y. & C. C. 380. The plaintiff John Rennie placed his writ of *fi. fa.* in the hands of the sheriff on the 10th July, 1896, before notice of the assignment from Block to the Quebec Bank was given to the firm of Reid, Taylor, and Bayne by the Quebec Bank, which notice was not given till the 28th July, 1896. The plaintiffs do not



require to have a lien on Block's interest in the firm before notice; all they require is to have an equity: *Elliott v. McConnell*, 21 Gr. 276; *Court v. Holland*, 29 Gr. 19; *Morris v. Livie*, 1 Y. & C. C. 380. The assignment is contrary to the Bank Act, 53 Vict. ch. 31, secs. 74, 75 (D.), as it was given to secure an antecedent or overdue debt, and no bill, note, or debt was negotiated at the time it was taken: *Dominion Bank v. Oliver* (1889), 17 O.R. 402; *Bank of Hamilton v. Shepherd* (1894), 21 A.R. 156; *Bank of Hamilton v. Halstead* (1897), 28 S.C.R. 235. A single creditor of Block, and without an assignment for the benefit of creditors by Block, is entitled to take advantage of the invalidity of the assignment: 58 Vict. ch. 23, sec. 1 (O.) The assignment was fraudulent and void against creditors and was made to defeat them and the plaintiff John Rennie, Block being insolvent or on the eve of insolvency when he made the assignment: *Rice v. Rice* (1899), 31 O.R. 59; *Bank of B.N.A. v. Rattenbury* (1859), 7 Gr. 383; *Buchanan v. Dinsley* (1865), 11 Gr. 132; *Forman v. Hodgson* (1865), 12 Gr. 150; *Pegg v. Eastman* (1867), 13 Gr. 137; *Cameron v. Cusack* (1889), 18 O.R. 520. The assignment was voluntary, no consideration having been given for the same: *Richardson v. Armitage* (1871), 18 Gr. 512; *Irwin v. Freeman* (1867), 13 Gr. 465; *Gignac v. Iler* (1898), 29 O.R. 147. If the assignment be invalid from any cause, the interest of Block in the firm of Reid, Taylor, and Bayne never passed from Block, and was still in him at the date of the sale by the sheriff to Margaret J. Rennie, and she is the owner of such interest by reason of the deed of Block's interest from the sheriff to her, and that interest is \$15,000, the sum the Quebec Bank received from Henderson, the receiver, on account of the assignment, as admitted in the bank's statement of defence. The sale by the sheriff took place under John Rennie's execution, which was placed in the sheriff's hands on the 10th July, 1896, and before the notice of the assignment was given by the Quebec Bank to the firm of Reid, Taylor, and Bayne, and, as the sale relates back to the time the writ was placed in the sheriff's hands, Margaret J. Rennie had an equity which entitled her to a preference over the assignment: *Wilson v. Corby* (1865), 11 Gr.

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92, 95. The settlement made between the Quebec Bank and the other creditors of Block was collusive and illegal, and the distribution of the goods or moneys of Block under such settlement was contrary to the Assignments Act and made to avoid the same: *Martin v. McAlpine* (1883), 8 A.R. 675; *Uffner v. Lewis* (1900), 27 A.R. 242. The Quebec Bank had actual notice and knowledge of the claim of the plaintiffs before the settlement was made and the moneys of Block distributed, and Henderson was notified on behalf of M. J. Rennie that she claimed all the moneys in his hands after paying the liabilities of Reid, Taylor, and Bayne, as belonging to Block, and not to pay the same to the Quebec Bank or to any other.

*A. B. Aylesworth*, K.C., and *H. G. Kingstone*, for the defendants. The appellants failed to prove insolvency on the part of Block at the time of the assignment or at any other time, or that he was on the eve of insolvency, or that the assignment was made with the fraudulent intent of preferring the bank to other creditors. The evidence shews that the assignment was not made by Block in expectation or anticipation of a result adverse to him of the litigation in *Rennie v. Block*. Up to that time the decisions of the Courts below had been in Block's favour, and he had reasonable grounds for expecting a favourable decision from the Supreme Court of Canada. The assignment by Block to the Quebec Bank was not of goods, chattels, wares, and merchandize, but was of two specific sums of money constituting a *bonâ fide* debt owing by Reid, Taylor, and Bayne to Block, amounting together to \$29,939.05. It was for good and valuable consideration, namely, the indebtedness of Block to the bank, and for the payment of which indebtedness the bank was at that time pressing Block. Nothing passed by the alleged sale by the sheriff of Block's interest in the firm. No seizure was ever made or attempted to be made by the sheriff. A writ of execution only binds a chose in action from the time of seizure thereof by the sheriff, and not from the time either of the issue of the writ or delivery thereof to the sheriff: *Harrison v. Harrison*, 14 P.R. 436; *Helmore v. Smith* (1886), 35 Ch. D. 449; Cababé on Attachment, 3rd ed., (Receiver) p. 98; R.S.O. 1897, ch. 77, sec. 18; *McDowell v. McDowell* (1863)

10 U.C.L.J.O.S. 48. It is not necessary to the validity of the assignment that notice thereof should be given by the Quebec Bank to the firm of Reid, Taylor, and Bayne: *Gorringe v. Irvell India Rubber Works* (1886), 34 Ch. D. 128; *Ward v. Duncombe*, [1893] A.C. 369, 377-92. Sections 74 and 75 of the Bank Act have no application to the matters in question in this action. Creditors such as the appellants have no status to invoke the aid of the Bank Act: *Conn v. Smith* (1897), 28 O.R. 629. The appellants do not sue on behalf of themselves and of all other creditors: R.S.O. 1897, ch. 147, sec. 10. These sections of the Act do not relate to persons engaged in business as *wholesale merchants* such as were the firm of Reid, Taylor, and Bayne. They were wholesale merchants and dealers in millinery and fancy goods, and were not engaged as *manufacturers* or in any other capacity intended to be covered by such sections: *Treacher v. Treacher* (1874), W.N. 1874, p. 4. The assignment by Block to the bank was not of goods, wares, and merchandize, or of any interest therein, but was of a debt or money demand owing by the firm to Block.

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April 10. ARMOUR, C.J.O.:—In my opinion the judgment appealed from is right and should be affirmed.

And first as to the action of the male plaintiff.

Debts are not included in the expression “goods, wares, and merchandize” as used in the Bank Act, 53 Vict. ch. 31 (D.)

Debts were held in *Ryall v. Rowles*, 1 Ves. Sr. 348, to be included in the expression “goods and chattels” as used in the Bankrupt Act under discussion in that case; and “choses in action were held to be included in the expression ‘goods and chattels’ in all the Bankruptcy Acts from the time of James I. downwards:” *Colonial Bank v. Whinney* (1885), 55 L.J. Ch. 585.

And this construction was put upon this expression by reason of the object and intent of these Acts.

The expression “goods and chattels,” as used in 13 Eliz. ch. 5, was held not to include debts because they could not be reached by an execution: *Dundas v. Dutens* (1790), 1 Ves. Jr. 196; *Sims v. Thomas* (1840), 12 A. & E. 536.

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And the expression "goods and chattels" as used in the Execution Act, R.S.O. 1897, ch. 77, plainly does not include debts.

The expression "goods, wares, and merchandize," as used in the 17th section of the Statute of Frauds, was held not to include choses in action: *Humble v. Mitchell* (1839), 11 A. & E. 205.

Debts not being included in the expression "goods, wares, and merchandize," as used in the Bank Act, there was nothing in that Act prohibiting the Quebec Bank from taking an assignment from Hugo Block of the debt due to him from his co-partners as security for the debt which he owed to the bank, and it cannot be said that the taking by the bank of such an assignment as such security was beyond the powers of the bank as not being incidental to the powers conferred upon it by its incorporation.

Had the taking of such an assignment by the bank been prohibited by the Bank Act, the difficult questions would have arisen which were suggested in *Ayers v. South Australian Banking Co.* (1871), L.R. 3 P.C. 548.

The assignment was for good consideration, and was made on the 4th February, 1896, and the execution of the male plaintiff against Hugo Block was placed in the sheriff's hands on the 10th July, 1896, and on the 28th July, 1896, the solicitors of the Quebec Bank wrote to Hugo Block's co-partners notifying them of the assignment by him to the Quebec Bank of "two certain debts" owing by them to him, "one amounting to \$20,000 and the other to \$9,939.05," to which the said co-partners replied, acknowledging the receipt of the said letter "notifying us that Mr. Hugo Block has assigned to the Quebec bank the amount of the debt due by our firm, viz., \$20,000 and \$9,939.05, total \$29,939.05, which sum was the amount at credit of his account on the 4th day of February last and also at this date."

The effect of the assignment as the law stood at the time it was made was to vest the property in the debts assigned in the Quebec bank, and notice of it to the debtors was not necessary to its validity, but was only necessary to prevent defences or set-off to the debts assigned arising after the assignment, and



before such notice, and to enable the title of the assignees to prevail against a subsequent assignee: R.S.O. 1887, ch. 122, secs. 11 and 12; *Gorringe v. Irwell India Rubber Works*, 34 Ch. D. 128.

But for the case of *Warnock v. Kloepper* (1888), 15 A.R. 324, 18 S.C.R. 701, I would have thought that, as the execution of the male plaintiff did not bind the debts due to Hugo Block by his co-partners, the male plaintiff could not have attacked the assignment without first obtaining and serving upon the debtors an order attaching all debts owing or accruing from them to Hugo Block, or by bringing an action on behalf of himself and of all the other creditors of Hugo Block; but that case decides that he could do so.

No evidence was, however, given by the plaintiffs which would have warranted the setting aside the assignment as offending either against the provisions of 13 Eliz. ch. 5, or of R.S.O. 1897, ch. 147.

It was conceded that, although it was intended that Reid, Taylor, and Bayne should be general partners and Block a special partner of the firm of Reid, Taylor, and Bayne, under the provisions of R.S.O. 1877, ch. 122, they became, the provisions of that Act not having been observed, general partners in the business carried on by that firm.

The effect of placing the execution of the male plaintiff in the sheriff's hands was to bind the goods of the partnership, so that, into whose ever hands they came afterwards, they were liable to be seized under it by the sheriff, and they might be conveyed away, but not so as to defeat the right of the execution creditor to have them seized: *Woodland v. Fuller* (1840), 11 A. & E. 859.

But, although goods in specie of the partnership were so bound, money, bank notes, cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, and other securities for money belonging to the partnership, were not so bound: *McDowell v. McDowell* (1863), 1 Ch. Ch. 140.

The sheriff could have gone on under this execution and seized all the assets of the partnership which were seizable under the execution, but he could not seize book debts or goodwill.

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No seizure was, however, made by the sheriff thereunder of any specific assets of the partnership, and all the assets of the partnership were sold, realized, and disposed of, and the male plaintiff lost any benefit which he might have derived from the seizure of any specific assets of the partnership seizable under his execution, and the sale thereunder of the undivided interest of Hugo Block therein.

Then as to the action of the female plaintiff. Her claim was under a bill of sale from the sheriff, which recited the placing of the execution of the male plaintiff in his hands, the seizure thereunder and under subsequent writs in his hands of all the undivided share and interest of Hugo Block exigible under execution in the partnership assets and business carried on by Reid, Taylor, and Bayne, the offering of the same for sale, the return of one of the subsequent writs "goods on hand for want of buyers to the value of \$30," the receipt by him of a writ of *venditioni exponas* upon the said return, and the sale thereunder to the female plaintiff for the sum of \$30, and by which the sheriff granted, bargained, and sold unto the female plaintiff "all the said undivided share or interest of the defendant Hugo Block exigible under execution in the partnership assets and business carried on by Reid, Taylor, and Bayne."

Nothing passed to the female plaintiff by this sale.

What the sheriff should have done was to have seized specific assets of the partnership of Reid, Taylor, and Bayne seizable under execution and to have sold the undivided interest of Hugo Block therein, but what he essayed to do was to seize and sell "the undivided share or interest of the defendant Hugo Block exigible under execution in the partnership assets and business carried on by Reid, Taylor, and Bayne;" and this he could not do.

The law on this subject is very clearly laid down by Lindley, L.J., in *Helmores v. Smith* (1), 35 Ch. D. 436, 447, where he said: "A writ of *fi. fa.* was issued against one of two partners in the business of coal merchants. Let us consider what the sheriff could do under that *fi. fa.* He could seize all such of the assets of the firm as are seizable under a *fi. fa.*, but he could not seize book debts or goodwill. The *fi. fa.* does not touch such things; and it is a mistake, and a very serious mis-

take, to suppose that when the sheriff, under a separate execution against one of several partners, seizes the partnership goods, and sells the share and interest of the execution debtor in those goods, the sheriff can or does in practice sell the whole of the execution debtor's interest in the partnership. Such a case is conceivable, but in practice it never arises, because there are always in practice assets which cannot be reached by a *fi. fa.* What the sheriff has got to sell is not the share and interest of the execution debtor in the partnership, but the share and interest of the executor debtor in such of the chattels of the partnership as are seizable under a *fi. fa.* The unfortunate purchaser from the sheriff has to find out what he has really had assigned to him, and that he can only do by a partnership account; there is no other method of proceeding."

The appeal must be dismissed with costs.

OSLER, J.A. :—It appears to me that this appeal may be disposed of on a very short and simple ground.

The defendant Hugo Block was a partner (whether general or special, I think, is not material) in the firm of Reid, Taylor, and Bayne, and his firm owed him, on the taking of an account between them, as his share or interest in the partnership, the sum of \$29,935.

On the 4th February, 1896, he owed the defendants the Quebec Bank, in respect of a past due debt, a sum exceeding that amount, and, by an instrument in writing of that date, he duly assigned the debt or claim or share so due to him by his partners to the bank, as security for his own debt to them.

An action had theretofore been brought by the plaintiff John Rennie against Block, in which the latter had recovered judgment, but in which, at the date of the assignment, an appeal was pending in the Supreme Court of Canada. The appeal was allowed on the 18th May, 1896, and a reference directed to take accounts between the parties in respect of the subject-matter of the action, and Rennie recovered judgment in the Supreme Court for the costs of his appeal throughout the various Courts in which it had been heard, execution for which was lodged in the sheriff's hands on the 10th July, 1896. Under that execution the sheriff, without making any actual

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seizure of the partnership assets, purported to sell and convey to the plaintiff Margaret Rennie on the 18th October, 1896, by deed bearing that date," "all the undivided share or interest of the defendant Hugo Block exigible under execution in the partnership assets and business of Reid, Taylor, and Bayne, in which firm the said Hugo Block is alleged to be a special partner." On the 10th November, 1898, this action was commenced by the plaintiff Margaret Rennie and her husband for the purpose of setting aside the assignment of the 4th February, 1896, as being fraudulent and void and made for purpose of defeating, delaying, and defrauding the creditors of the defendant Hugo Block.

Apart from its alleged fraudulent character, it was also contended that the bank had no right in law to take the assignment, and that it was void under the provisions of secs. 68, 74, and 75 of the Banking Act, 53 Vict. ch. 31 (1890). And it was argued that, even if the security was one which the bank had power to take, the assignment was incomplete and ineffectual as against the execution, notice thereof not having been given to the debtors, Reid, Taylor, and Bayne, until the 28th July, 1896, after the writ under which the plaintiff makes title had been delivered to the sheriff.

That the plaintiff Margaret Rennie, if the sale under the execution conferred upon her any interest in the property purported to be sold, would be in a position to attack the bank's title, if it were invalid under the provisions of the Bank Act, may be conceded upon the authority of *Bank of Toronto v. Perkins* (1883), 8 S.C.R. 603; *National Bank of Australasia v. Perkins* (1870), L.R. 3 P.C. 299; and other cases which might be referred to. There is, however, nothing that I am aware of in the Act which prohibits a bank from taking such security as that now in question for a debt which has been contracted to it in the course of its business. Section 68 forbids a bank to lend money or make advances either directly or indirectly upon a security, mortgage, or hypothec of any lands, tenements, or immovable property, or of any ships or other vessels, or upon the security of any goods, wares, or merchandize; but, even if a debt can be considered as goods, wares, or merchandize, within the meaning of this section, the bank did not advance



its money, nor was Block's debt to it contracted, upon the security of the assignment. That debt had already been contracted (upon what security we do not know) when the assignment was taken, and it was so taken as only additional security therefor. That is expressly authorized by sec. 68. I refer to *Bank of Montreal v. McWhirter* (1867), 17 C.P. 506, 513; *Bank of Upper Canada v. Killaly* (1861), 21 U.C.R. 9, 15; and *In re Rainy Lake Lumber Co.* (1888), 15 A.R. 749.

As regards the absence of notice to the debtor of the assignment having been made, that is not material, as the assignment was made before the 31st December, 1897. Notice to the debtor is now required by sec. 57, sub-sec. 5, Ont. Jud. Act, for the purposes of or to the extent required by that section, but only in respect of "debts or other legal choses in action" made on or after that date.

Then, upon the merits of the case; whatever interest the plaintiff Margaret Rennie acquired by her purchase at the sheriff's sale under her husband's execution was clearly subject to the right of the bank under the assignment. Her contention is that the assignment is void against her under the Statute of Elizabeth, but there is, as the Courts below have also held, an entire absence of evidence that it was made with intent to delay and defraud the execution creditor in his action against Block. It was made at the request of the bank and with the legitimate object of giving them the additional security they required.

I do not know on what ground John Rennie was made a party to the present action, as his wife, as the purchaser at the sale under the execution, is the only person now interested in getting rid of the assignment. Her action fails on the ground I have mentioned, and probably also on other grounds, into consideration of which I do not think it is necessary to enter.

The appeal should be dismissed with costs.

MACLENNAN and MOSS, JJ.A., concurred.

LISTER, J.A., died while the appeal was under consideration.

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## IN RE PUBLISHERS' SYNDICATE—MALLORY'S CASE.

Feb. 21.

*Company—Subscription for Shares—Contemporary Condition—Allotment—Notice—Liability as Contributory.*

*Held*, under the circumstances of this case, where an applicant had agreed to take shares in a company conditional on his receiving certain moneys to pay for them, that he had the right to withdraw his application, as he did, not having received any formal notice of allotment, by informing the company of his inability owing to non-receipt of the moneys, to pay for the shares, and that he was not liable as a contributory.

THIS was an appeal by M. B. Mallory from a judgment of Mr. Winchester, Official Referee, sitting for the Master in Ordinary in a winding-up case, whereby he ordered that Mallory's name should be settled upon the list of contributories as the holder of five shares of unpaid stock in the company.

The facts appear in the judgment.

The appeal was argued before STREET, J., in Weekly Court on January 30th, 1902.

*W. E. Raney*, for the appellant, contending that the condition here as to the \$700 was either a term of payment or a condition precedent, and as it had failed there was no liability; it was not a case of a collateral agreement, which is an important distinction: *In re Rolling Stock Co. of Ireland, Shackelford's Case* (1866), L.R. 1 Ch. 567; *Re Standard Fire Insurance Co., Turner's Case* (1884), 7 O.R. 448; *In re Leeds Banking Co., Howard's Case* (1866), L.R. 1 Ch. 561; *In re National Equitable Provident Society, Wood's Case* (1873), L.R. 15 Eq. 236; *In re Universal Banking Co., Rogers' Case* (1868), L.R. 3 Ch. 633; Buckley's Company Act, 6th ed., p. 65, and cases there referred to; that *In re Richmond Hill Hotel Co., Elkington's Case* (1867), 2 Ch. 511, was a case of a collateral agreement and therefore distinguishable; that, moreover, there was no notice of any allotment of shares, which is a necessary element in the case: *In re Richmond Hill Hotel Co., Pellatt's Case* (1867), L.R. 2 Ch. 527; *In re Universal Banking Corporation, Gunn's Case* (1867), L.R. 3 Ch. 40; *Nasmith v. Manning* (1881), 5 S.C.R. 417; *Household Fire, etc., Ins. Co. v. Grant*

(1879), 4 Exch. D. 216; *In the Matter of the Zoological and Acclimatization Society of Ontario, Cox's Case* (1889), 16 A.R. at p. 543; that a company might withdraw allotment of shares before notice had been given.

*C. D. Scott*, for the liquidator, contended that in the case of a simple application, simple acceptance was all that was necessary without notice of allotment: *The New Theatre Co. (Ltd.)*, *Bloxam's Case* (1864), 33 Beav. 529; that if notice was necessary, there had been demands for payment and that was sufficient; that, moreover, the alleged condition was not communicated to the board of directors, as it should have been. He also referred to *Jackson v. Turquand* (1869), 39 L.J. Ch. 11.

*Raney*, in reply, referred to Buckley on the Companies Acts, 6th ed. at p. 58, as to *Bloxam's Case*.

February 21. STREET, J.:—Stark was an agent of the company, and was authorized to obtain subscriptions for its shares, being paid by a commission. Upon his solicitation, Mallory signed and handed to him an application for five shares, with the understanding that the application was subject to a condition, not appearing on its face, that he was not to be required to accept any allotment that might be made unless and until he should collect a sum of about \$700, then due him, and which would enable him to pay for the shares. This condition was fully communicated to the president of the company, to whom the application was handed by Stark, but it is not clear whether this was done at the time the application was handed in or shortly afterwards. The board of directors allotted five shares to Mallory upon the application being laid before them. There is no evidence whatever that any formal notice of the allotment was ever given to Mallory; he never paid any money upon the shares; never attended any meeting of shareholders, and never in any way acted as if he were a shareholder. He never collected the \$700 upon which he had relied as a means of paying for the shares: he was twice asked by persons sent on behalf of the company whether his money had come in, and whether he intended to take or pay for the

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shares, and on each occasion he gave the messenger to understand that his money had not come in, and that he would be unable to take them. Finally he went to the company's office and told the president that he had failed to collect his money, and would not take the shares, and was told that it was all right.

Under these circumstances, I am of opinion that I must hold that the company never notified him that they accepted his offer to take the shares, and that he withdrew his application when he told the president in the office of the company (the president knowing the condition upon which the application had been made) that he would not take them. The fact that a condition accompanied the application is a sufficient reason for the absence of inquiry on the part of Mallory as to the fate of his application: he appears to have rested content, believing that until he informed the company that he had collected his money, no liability on his part would be incurred.

Had the company notified Mallory that the shares had been allotted to him, other questions would have arisen in case he had not promptly repudiated their right to allot the shares to him, and it is not to be doubted that had he done so, the allotment must have been cancelled.

The appeal must be allowed, with the costs here and below to be paid by the liquidator.

See *Pellatt's Case*, L.R. 2 Ch. 527; *Shackleford's Case*, L.R. 1 Ch. 567; *Gunn's Case*, L.R. 3 Ch. 40; *Roger's Case*, L.R. 3 Ch. 633; *Ex parte Fox* (1863), 11 W.R. 577.

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[IN THE COURT OF APPEAL.]

MADILL

V.

THE CORPORATION OF THE TOWNSHIP OF CALEDON.

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April 16.

*Way—Highway—Sidewalk thereon—Voluntary Subscription and Statute Labour  
—Liability of Municipality to Repair.*

The judgment of Meredith, J., reported *ante* p. 66, was affirmed on appeal.

THIS was an appeal by the corporation of the township of Caledon from the judgment of Meredith, J., reported *ante* p. 66.

The appeal was argued on April 15th, 1902, before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and GARROW, J.J.A.

*E. F. B. Johnston*, K.C., and *E. G. Graham*, for the appeal. The corporation of the township were not liable to repair or keep in repair the sidewalk, even if the sidewalk was, where it was, long enough and out of repair long enough to impute notice to the corporation. They are only liable to the extent the Legislature has made them; and that is governed by sections 606, 607, 608 and 676 of the Municipal Act, R.S.O. 1897, ch. 223. Section 606 says: "Every public road, street, bridge or highway shall be kept in repair." Section 607 provides that the corporation shall not be liable to repair "any road, street, bridge or highway laid out by any private person." And neither section includes "sidewalks." Section 608 provides for the repair of *sidewalks*, but only such as are made *with the permission* of the council upon any toll road. The Legislature distinguishes between highways and sidewalks, so the highway does not include everything—that is, the whole 66 feet wide highway. The highway and sidewalk are different entities. There was no permission obtained from the council to build this sidewalk: sec. 676. The country and roads of the township are very rough, and what is "repair" varies with circumstances: *O'Connor v. The Township of Otonabee* (1874), 35 U.C.R. 73; *Lucas v. The Township of Moore* (1879), 3 A.R. 602. The parties putting down this sidewalk cannot compel the

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council to assume its care and repair: *In re McBride and the Corporation of the Township of York* (1871), 31 U.C.R. 355, *per* Wilson, J., at p. 358. The evidence here negatives any dedication or acceptance. In *Huffman v. Township of Bayham* (1899), 26 A.R. 514, the stand extended over the actual travelled part of the road. *The Borough of Bathurst v. McPherson* (1879), 4 App. Cas. 256, was overruled by *Cowley v. The New-market Local Board*, [1892] A.C. 345: there the statute declared that the board should repair the highway, but it was held that no action lay: *Municipal Council of Sydney v. Bourke*, [1895] A.C. 433; *Thompson v. Mayor, etc., of Brighton*, [1894] 1 Q.B. 332. The provision in our statute as to bringing an action does not exist under the English statute, and although there is a duty imposed, it has been held that no action lies for a breach; and here the plaintiff stands on no higher ground. No indictment would lie here, so there is no nuisance. At the highest, there was mere nonfeasance.

*E. E. A. DuVernet*, contra. The sidewalk was out of repair and in a state to be a nuisance. The evidence shews a certain sum from the taxes was commuted and expended upon it, as well as a certain amount of statute labour. The sidewalk was a nuisance and a continuing nuisance to the knowledge of the council, even if put there by another, and the council are responsible for the damage: *Castor v. The Corporation of the Township of Uxbridge* (1876), 39 U.C.R. 113; *Rice v. Town of Whitby* (1898), 25 A.R. 191, *per* Osler, J.A., at p. 198; *Gordon v. The City of Belleville* (1887), 15 O.R. 26; *Ewing v. Hewitt* (1900), 27 A.R. 296, at p. 299. The English cases cited by counsel have no application, as the Ontario Municipal Act makes the defendants liable both for misfeasance and nonfeasance.

*Johnston*, in reply.

April 16. The judgment of the Court was delivered by Moss, J.A.—I am of opinion that the judgment appealed from should be affirmed. The case presents no new features, and involves no new principles. All that has been decided is that the defendants were bound to keep the highway in repair at the place where the accident happened to the plaintiff, and

were liable for damages resulting from their default in keeping it in repair; that it was out of repair at the time when the accident happened to the plaintiff, and that the want of repair was the cause of the accident and of the resultant injuries to the plaintiff.

The evidence establishes beyond question, that the highway is one for the maintenance of which in good repair the defendants are responsible. Their liability to keep it in repair is admitted as regards the central portion or part on which vehicles travel; but it is contended that it does not extend to the side or portion on which the sidewalk is shewn to be. But that part is as much a part of the original road allowance as the centre part, and may be lawfully used by persons travelling on foot. The evidence shews that it has been so used for over twenty years, and it is impossible to say that it is not part of the public highway in the keeping and under the control of the defendants.

It is not necessary to determine the origin of the sidewalk. If it was placed there by the defendants, or being there, was assumed by them, their liability is clear. If it was not placed there or assumed by them, they allowed it to remain there, and in its condition of non-repair it was an obstruction to the safe use of the travelled way, which it was the defendants' duty to remove; and by reason of their neglect of this duty, the highway was out of repair. And they are liable to the plaintiff for the injuries which she suffered in consequence.

The appeal should be dismissed with costs.

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RE PHILLIPS V. HANNA.

April 10.

*Prohibition—Division Court—Post Diem Interest on Mortgage—Splitting Cause of Action—Jurisdiction—R.S.O. 1897, ch. 60, sec. 79.*

Plaintiff, on November 2, 1901, brought an action in a division court for one year's interest due February 1, 1901, and for interest on that sum, amounting together to \$81.50, due on a mortgage, the principal of which was some years overdue:—

*Held*, that the interest sued for, being interest *post diem*, as to which there was no covenant to pay, was not due the plaintiff *qua* interest, but was recoverable only by way of damages, and the case did not come within the provisions of sub-sec. (2) of sec. 79 R.S.O. 1897, ch. 60:—

*Held* also, that the plaintiffs, if entitled to recover interest from February 1, 1900, were entitled to recover as damages interest down to the date of the issue of the summons amounting to about \$140, which sum was divided for the purpose of suing in the division court, which is forbidden by section 79. Prohibition granted.

THIS was an application for prohibition to the Judge and clerk of the first division court of the united counties of Northumberland and Durham to prohibit them from taking further proceedings in an action in that Court in which Mary A. Phillips and Joseph Ruse were plaintiffs and Albert Hanna was defendant. The facts appear in the judgment.

The application was made in Chambers on February 3rd, 1902, before MEREDITH, C.J.C.P.

*R. McKay*, for the applicant. The claim involves a splitting of the cause of action contrary to the provisions of the Division Courts Act, and is for interest after the date at which the principal sum under the mortgage is payable; interest is recoverable therefore only by way of damages and not as interest payable under the contract. Sub-section 2 of section 79 of the Division Courts Act, R.S.O. 1897, ch. 60, is not applicable, the interest not being payable upon the mortgage, and not being due as a separate sum for interest, but only as an accretion to the principal by way of damages. There is further a splitting of the cause of action in that the interest is sued for as one year's interest down to the 1st of February, 1901, the action being begun in November of 1901; interest by



way of damages accrues *de die in diem*, and the action, if it lies at all for interest separately, should have been for the amount of interest accrued down to the date of the issue of the summons. The plaintiffs have, by claiming the entire amount of principal due, treated the whole amount as payable. I refer to *The Peoples Loan and Deposit Co. v. Grant* (1890), 18 S.C.R. 262; *St. John v. Ryckert* (1884), 10 S.C.R. 278; *Powell v. Peck* (1888), 15 A.R. 138; *Re The Real Estate Loan Co. v. Guardhouse* (1898), 29 O.R. 602.

*F. E. Hodgins*, contra. Section 79, sub-sec. 2 of the Act governs this case, as the covenant is with the mortgagee or his executors, who are plaintiffs here. *Re The Real Estate Loan Co. v. Guardhouse*, 29 O.R. 602, applies. The mortgage sufficiently provides for interest *post diem*. Even if interest *post diem* is in the nature of damages: it certainly is "a sum due for interest" upon a mortgage within sub-sec. 2 of sec. 79. It is so treated in *Muttlebury v. Stevens* (1886), 13 O.R. 29, and in *Gordillo v. Weguelin* (1877), 5 Ch. D. 287, at p. 301, where Brett, J.A., says: "In a court of equity it is not called damages but it is called interest." See also p. 303.

*McKay*, in reply.

April 10. MEREDITH, C.J.:—The applicant on the 21st October, 1884, made a mortgage to the respondents' testator securing \$1,300, and interest payable as follows: \$100 on the 1st February, 1888; \$100 on the 1st February, 1889; \$100 on the 1st February, 1890; \$100 on the 1st February, 1891; and the remaining \$900 on the 1st February, 1892; the interest to be computed from the 1st February, 1885, and to be paid annually on the 1st day of February thereafter on the unpaid principal, till the whole sum secured should be paid up in full, the interest for the first year to be at the rate of five per cent. per annum, and thereafter at six per cent. per annum.

The whole principal sum being unpaid, the respondents on the 2nd November, 1901, sued the applicant, in the first division court of the united counties of Northumberland and Durham, for \$81.50, being one year's interest on the principal sum from the 1st February, 1900, to the 1st February, 1901, and interest thereon from the latter date; and the applicant now moves for

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prohibition upon the ground, that the cause of action is not within the jurisdiction of the division court.

The application must be granted, unless the case is brought within the provisions of sub-sec. 2 of sec. 79 of the Division Courts Act, R.S.O. 1897, ch. 60, and in my opinion, it is not.\*

The interest for which the respondents sue, being interest *post diem*, is not due to them *qua* interest, but is recoverable only by way of damages, and it was not, I think, intended, by the legislation in question, to qualify the provision which forbids the dividing of a cause of action into two or more actions for the purpose of bringing it within the jurisdiction of the division court, so as to enable a person to sue separately for a sum due and payable for principal, and also for a sum due and payable for interest, except where the sum claimed for interest is due according to the terms of the instrument sued on, and not where it is due and payable, as in this case, as damages.

There is, besides, the further objection that the respondents, if entitled to recover interest from the 1st February, 1900, were entitled to recover, as their damages, interest down to the date of the issue of the summons, so that the sum to which they were entitled, if interest were allowed at the rate of six per cent. per annum, would be about \$140; and this sum is divided for the purpose of suing in the division court, and that is forbidden by section 79.

Upon the whole, I am of opinion that the order must be made as asked, with costs.

\*79.—(1) A cause of action shall not be divided into two or more actions for the purpose of bringing the same within the jurisdiction of a division court, and no greater sum than \$100 shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds \$400.

(2) Where a sum for principal and also a sum for interest thereon is due and payable to the same person upon a mortgage, bill, note, bond or other instrument, he may, notwithstanding anything in this section contained, but subject to the other provisions of this Act, sue separately for every sum so due.

G. A. B.

## [DIVISIONAL COURT.]

GILDNER v. BUSSE.

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March 3.

*Defamation—Slander—Privilege—Master and Servant.*

A master is not necessarily liable in damages for slander because in the presence of fellow servants or even of casual bystanders he accuses his servant of theft. Such an accusation is *prima facie* privileged, and to destroy the qualified privilege there must be some evidence of malice, such as want of belief in the accusation, intemperate language, seeking the opportunity to make the accusation publicly, or the like. Judgment of Boyd, C., reversed.

APPEAL by the defendant from the judgment at the trial.

The action was brought to recover damages for slander, and was tried before Boyd, C., and a jury, at Toronto, on the 23rd of September, 1901, when a verdict was given in the plaintiff's favour for \$100, and judgment was entered for that amount and costs.

The defendant was a butcher and sausage maker and the plaintiff was one of his workmen. The plaintiff alleged and proved that on two occasions the defendant had accused him of theft. The defendant did not justify, but contended that each of the occasions was privileged, and the main contest on the appeal was on this question, the learned Chancellor having ruled against the defendant. The evidence was very conflicting as to many of the points involved, especially as to the right claimed by the plaintiff, as one of the terms of his employment, to take meat for his own use. For the purpose of this report, however, it is sufficient to say that the defendant, finding that meat was being taken, as he thought wrongfully and surreptitiously, and believing that the plaintiff was taking it, went to the room where the plaintiff was working and there, in the presence of two of the plaintiff's fellow workmen, had some conversation in reference to the matter, and then, in their presence, called the plaintiff a thief and ordered him out of the premises, using, as was alleged by the plaintiff, at the same time some strong epithets in reference to the plaintiff. Six days later the plaintiff called at the defendant's shop and

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demanding of the defendant payment of his wages. The defendant refused to pay the wages and shoved the plaintiff out of the shop door, and as he was doing so again called the plaintiff a thief. At this time there was in the shop a customer who was, however, some distance from the plaintiff and the defendant. This customer was not called as a witness, and it was not shewn whether the words of the plaintiff were, or were likely to have been, heard by the customer. It was alleged, however, that the words could have been heard by some persons in the street who were passing at the time. Some reference was made in the evidence to an account of the dispute published in a newspaper. The plaintiff, however, in his pleading in this action did not make any reference to this newspaper report, or claim any damages in respect thereof, and upon objection taken by the defendant's counsel evidence as to this newspaper report was rejected. In his charge to the jury the learned Chancellor said as to damages that if the jury took the view that the defendant and his witnesses were telling the truth they were to measure the damages by the very smallest coin they could find; but that if they thought the plaintiff and his witnesses were telling the truth, and that the charge was a trumped up thing on the part of the defendant to get rid of the plaintiff and to avoid paying him his wages, and that he had been calling him a thief "and spreading it about in the papers to cause him as much damage as possible," they were to give the plaintiff good round damages.

The appeal was argued before FERGUSON, and MEREDITH, JJ., on the 6th of February, 1902.

*W. J. O'Neil*, for the defendant. The two occasions on which the alleged slander was spoken were privileged. On the first occasion the only persons present were fellow workmen of the plaintiff, and the defendant was justified in making the accusation in their presence as they were concerned in the very matter in question: *Somerville v. Hawkins* (1851), 10 C.B. 583. The second occasion was also privileged, and, moreover, there is not any evidence that the words then spoken were heard by anyone except the plaintiff. The accidental presence of passers by would not destroy the privilege: *Pittard v. Oliver*,



[1891] 1 Q.B. 474. There is no evidence of malice, and therefore a nonsuit should have been granted. Even if it can be contended that there is any evidence of malice there must be a new trial.

*J. M. Godfrey*, for the respondent. The defendant was not justified in making the charge in question against the plaintiff on the first occasion in the presence of his fellow workmen, and on the second occasion in the presence of the customer and at such a place as to be heard by passers by. There was therefore no privilege. In addition to this there was evidence of malice, particularly by reason of the use of improper epithets. The case was left fairly to the jury and their verdict should not be disturbed: *Wells v. Lindop* (1887), 14 O.R. 275; (1888), 15 A.R. 695.

*O'Neail*, in reply.

March 3. The judgment of the Court was delivered by MEREDITH, J.:—The jury were told, in effect: "If you believe the defendant and his witnesses, you will measure the damages by the very smallest coin you can find; but, if you believe the plaintiff and his witnesses, you would give him good round damages, not however up to \$2,000, nor anything near it." \$2,000 was the sum claimed for damages in the statement of claim.

Nor were the jury warned that they were not to give damages for the slander given in evidence, but not sued for in this action.\*

They ought to have been so warned; and, if the observations, as to the amount of damages, were intended as binding upon them, and not merely as suggestions, as to what they might, or probably would, do, they encroached upon the province of the jury.

But the most serious objection to the course of the trial is in the ruling, and charge to the jury, that neither of the occasions, of the publication of the alleged slanders, was privileged. They were both privileged.

The ground of the ruling as to the first occasion seems to have been, that other servants were called in, or present.

\*The newspaper report.—REP.

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But how can that destroy the privilege, especially in such a case as this where they were all more or less directly concerned in the matter? The plaintiff's goods were said to be then wrapped up in a workman's apron, and hidden, so as to indicate an intention to carry them away feloniously. All were concerned, not only in the discharge of a fellow servant for theft, but, more directly so, in the question, whose was the apron, and who had used it in that way. The cases seem to make the contention that the occasion was privileged abundantly clear.

In *Somerville v. Hawkins*, 10 C.B. 583, the master had called in two other of his servants, and, addressing them in the presence of the plaintiff, had said, "I have dismissed that man for robbing me; do not speak to him any more in public, or in private, or I shall think you as bad as him"; yet it was held a privileged occasion, on the ground that it was the duty of the master, and also in his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff, inasmuch as such an association might reasonably be apprehended to be likely to be followed by injurious consequences both to the servants and the master. So, too, in *Taylor v. Hawkins* (1851), 16 Q.B. 308, where a master, about to dismiss his servant for dishonesty, called in a friend to hear what passed, and, in his presence, accused the servant of theft, and discharged him, the occasion was held to be privileged.

It is said that on the second occasion a stranger, a mere bystander, was within hearing; and it was contended that that circumstance destroyed the privilege.

That effect, however, does not necessarily remove the privilege, or prove malice; it depends upon the circumstances of the case.

Parke, B., in delivering the judgment of the Court in the case of *Toogood v. Spyring* (1834), 1 C.M. & R. 181, deals with the question thus: "Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice is that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to

some person interested in the inquiry, *alone*, and not in the presence of a third person. If made with honesty of purpose to a person who has any interest in the inquiry (and that has been very liberally construed), the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed on this and similar communications, and if, on every occasion on which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master *bond fide* to discharge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of *necessity* take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is *sought* for making such a charge before third persons, which might have been made in private, it would afford strong evidence of malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bond fide* in making the charge, or been influenced by malicious motives."

That language is very applicable to the facts of this case: see also *Hunt v. Great Northern R.W. Co.*, [1891] 2 Q.B. 189; *Pittard v. Oliver*, [1891], 1 Q.B. 474; *Tench v. Great Western R.W. Co.* (1873), 33 U.C.R. 8; and *Miller v. Johnston* (1874), 23 C.P. 580.

The *Hawkins* cases are both instances of the presence of strangers not affecting the privilege, nor being reasonable evidence of malice; and in which the plaintiff was non-suited.

On the second occasion, the plaintiff, after having been discharged, and refused his wages, for the expressed reason that he had stolen from his master, of his own motion went to the defendant's shop, and, in the presence of the stranger, again

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demanding his wages, and was again refused them, and turned out of the shop, for the same expressed reason. The occasion was privileged; the plaintiff had himself to blame for raising the disputation in the presence of the stranger, and, if there were no evidence of actual malice, the plaintiff ought to have been nonsuited.

But, upon the whole case, there was, I think, enough evidence to entitle the plaintiff to go to the jury upon that question, the onus of proof of which was of course upon him.

It is well to say as little as possible that might in any way affect that question at a future trial; it is enough, for the purposes of this motion, to refer to the contradictory character of the testimony at the trial upon almost every material fact; and to say that, if all that made for the plaintiff were believed, and all that made for the defendant were disbelieved, there was enough in the case to call for the intervention of a jury, to determine where the truth lay in the conflicting statements referred to, and whether the defendant did, or did not, act in good faith, but was, or was not, actuated by actual malice, in accusing the plaintiff of theft.

There has been a mistrial; there must be a new trial, if the parties desire to fight their battle over again. The costs of the former trial, and of this motion, should be costs in the action, to the defendant only.

R. S. C.

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[ROBERTSON, J.]

IN RE REX V. MEEHAN.

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April 10.

*Criminal Law—Municipal Elections—Illegal Voting—Indictable Offence—Information—Police Magistrate—Mandamus.*

Voting in more than one ward at a municipal election by general vote, contrary to the provisions of 1 Edw. VII. ch. 26, sec. 9 (O.), is an indictable offence, and mandamus lies to a police magistrate having territorial jurisdiction to compel him to consider and deal with an application for an information for such an offence.

MOTION for mandamus. The following statement of the facts is taken from the judgment:—

This was a motion to make absolute a rule *nisi* issued on the 27th of February, 1902, calling upon James Morrison Glenn, police magistrate in and for the city of St. Thomas, and Patrick Meehan, to appear and shew cause why an order should not be issued and granted directing and commanding the said magistrate to receive and take the oath of one Alexander D. Turner to a certain complaint or information in writing, preferred by the said Turner against the said Patrick Meehan, and to proceed thereon according to law. The rule was issued under R.S.O. 1897, ch. 88, sec. 6. The affidavits and papers filed on the motion shew that the complainant, Turner, did attend at the police court in the city of St. Thomas on the 3rd of February last before the said police magistrate, and requested and demanded that he the said police magistrate should receive an information under oath from him, the said Turner, declaring that he was informed and believed that the said Patrick Meehan, on the 6th day of January, A.D. 1902, at the said city of St. Thomas, after having voted once and not being entitled to vote again at the election for aldermen to serve for the municipal corporation of the said city of St. Thomas for the year 1902, being then and there held, did wilfully and corruptly apply at the said election for a ballot paper in his own name; and did at the said election of aldermen being then and there held, wilfully and corruptly vote three times for aldermen, contrary to the statutes in such

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case made and provided; and did thereby commit an interference with an election; that the said police magistrate did then and there, to wit, at the police court in the said city of St. Thomas, refuse to receive the said information and to swear the said Alexander D. Turner, and to proceed thereon: alleging, as a reason, that he the said police magistrate had no jurisdiction, either to hear the case and to dispose of it summarily; or to hold a preliminary investigation and determine whether the accused should be committed for trial if the evidence warranted him in so doing.

The election in question was by general vote, and took place on the 6th of January, 1902. By 1 Edw. VII. ch. 26, sec. 9 (O.), the Municipal Act, R.S.O. 1897, ch. 223, is amended by inserting the following section:—"158*a*. In towns and cities where the councillors or aldermen are elected by general vote every elector shall be limited to one vote for the mayor and one vote for each councillor or alderman to be elected for the town or city, and shall vote at the polling place of the polling sub-division in which he is a resident, if qualified to vote therein; or when he is a non-resident, or is not entitled to vote in the polling sub-division where he resides, then where he first votes and there only." The charge is that Meehan voted for aldermen more than once, contrary to this provision.

In regard to offences and penalties, sec. 193 (*f*) declares that "No person shall, having voted once, and not being entitled to vote again at an election, apply at the same election for a ballot paper in his own name, or advise, or abet, counsel or procure any other person so to do." By sub-sec. 3 of this section, "A person guilty of any violation of this section shall be liable, if he is the clerk of the municipality, to imprisonment for any term not exceeding two years, with or without hard labour; and, if he is any other person, to imprisonment for a term not exceeding six months, with or without hard labour."

By the Criminal Code, sec. 138, it is declared that "Every one is guilty of an indictable offence, and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada, or of any legislature in Canada, by wilfully doing any act which it forbids, or omitting to do any

act which it requires to be done, unless some penalty is imposed or other mode of punishment is expressly provided by law."

The offence sought to be charged against Meehan is that he did wilfully and corruptly apply at the said election for a ballot paper in his own name; and did at the said election wilfully and corruptly vote three times, contrary to sec. 158a of the Municipal Act; whereby and by reason thereof he the said Meehan did, without lawful excuse, violate the said sec. 158a of the Municipal Act, contrary to sec. 138 of the Criminal Code, 1892.

The motion was argued before ROBERTSON, J., on the 13th of March, 1902.

*J. R. Cartwright*, K.C., asked leave to appear for the Attorney-General of Ontario, but on objection being taken by the respondents' counsel he did not press the application, and retired from the case, referring first as *amicus curiæ* to 5 Burn's Justice, p. 730; 2 Hawk. P.C., ch. 25, sec. 4; 1 Bishop on Criminal Law, 7th ed., sec. 237; Bacon's Abr., Tit. "Statute"—K; 1 Russell on Crimes, 6th ed., p. 199 *et seq.*; *Rex v. Harris* (1791), 4 T.R. 202; *Rex v. Sainsbury* (1791), 4 T.R. at p. 457.

*J. M. McEvoy*, for the applicant. In order to succeed in this application it is necessary to make out that the offence charged is an indictable one. The information charges that the offence is one both against the common law and against the statute law, but in view of the decision in *Regina v. Hogg* (1865), 25 U.C.R. 66, it probably cannot be successfully contended here that the act complained of would be an indictable offence as at common law. That there has been, however, an offence against the statute law, and that that offence is an indictable one, is clear. The local legislature has undoubtedly power to declare that a certain act or omission shall be an offence. In *Hamilton v. Massie* (1889), 18 O.R. 585, a breach of a regulation passed under the authority of an Ontario statute was held to be an indictable offence; and see also *Regina v. Lawrence* (1878), 43 U.C.R. 164, and *Regina v. Holland* (1894), 30 C.L.J. 428. There being a breach of the Ontario statute, it is either in itself an indictable offence,

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under sec. 193 of the Municipal Act, or at the least the provisions of the Criminal Code, sec. 138, apply and make that breach an indictable offence. Apart from this, the breach of a general direction of an Act of Parliament is an indictable offence: *Regina v. Buchanan* (1846), 8 Q.B. 883, at p. 887. The magistrate should, therefore, have taken the information, and should now be compelled to do so.

*E. E. A. DuVernet*, for the respondent. This is purely a statutory offence, and an indictment will not lie. Before the amendment in question, voting twice for mayor or reeve was prohibited under a penalty of \$50, to be recovered by suit in the division court. Clearly sec. 193 did not apply then, and it should not be made applicable to the new offence, which is certainly not of a graver nature. The reasonable inference is that the same penalty was intended, and that there has been an oversight in the wording of the section. The Criminal Code, sec. 138, does not apply. The Dominion Parliament cannot make a breach of a Provincial Act an indictable offence, nor can the Provincial Legislature bring within the Dominion criminal procedure an act which the Provincial Legislature chooses to make an offence: *Regina v. Wason* (1890), 17 A.R. 221. The Provincial Legislature cannot make an act a crime, though it can make it an offence and impose a punishment. They have failed in this instance to impose the punishment, but that does not enable the provisions of the Dominion Act to be appealed to. Nor is it correct to say that the breach of a statutory provision in itself constitutes an indictable offence. The contrary has been held in *Regina v. Strong* (1897), 33 C.L.J. 203, and *Regina v. Palin* (unreported), Belleville Assizes, 1st October, 1897, prosecutions under the Dominion Election Act for personation. If the offence is indictable, however, mandamus to the magistrate will not lie, because there is the alternative remedy by proceeding before the grand jury. Nor was there a tender of fees here, and this is sufficient to justify the refusal to take the information: *In re Township Clerk of Euphrasia* (1855), 12 U.C.R. 622. At any rate the magistrate was entitled to exercise his discretion: *Ex parte Lewis* (1888), 21 Q.B.D. 191, at pp. 195-6; *Thompson v. Desnoyers* (1899), 3 Can. Crim. Cas. 68; *Ex parte MacMahon* (1888), 48 J.P. 70; *Rex v. Hughes* (1835), 3 A. & E. 425.



*McEvoy*, in reply. There are no fees payable in indictable matters, and besides, non-payment of fees was not the ground of refusal. Nor was any discretion exercised; the magistrate should have taken the information, and after that have decided as to his jurisdiction.

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April 10. ROBERTSON, J.:—It is conceded that falsely personating a voter at a municipal election is not an indictable offence: *Regina v. Hogg*, 25 U.C.R. 66; and by analogy, wrongfully voting twice at the same election would not be indictable *per se*; but the act of voting twice is now by section 158*a* declared prohibitory, and “Wherever a person does an act which a statute, on public grounds, has prohibited generally, he is liable to an indictment,” *per* Lord Denman, C.J., in *Regina v. Buchanan*, 8 Q.B. at p. 887. Then his lordship goes on to say:—“I quite agree that, where, in the clause containing the prohibition, a particular mode of enforcing the prohibition is prescribed, and the offence is new, that mode only can be pursued. The case is then as if the statute had simply declared that the party doing the act was liable to the particular punishment. But where there is a distinct absolute prohibition, the act is indictable.”

Here sec. 158*a* does not contain a particular mode of enforcing the prohibition, and the offence is new; therefore the only remedy is by indictment. It is contended, however, that a penalty is prescribed by sec. 193, sub-sec. 3, of the Municipal Act, but on examination it will be found that the penalty does not apply to the offence of having voted more than once, but only applies to those who have applied for a ballot paper when not entitled to one as set forth in paragraphs (*e*) and (*f*). It is true the proposed information in this case charges that Meehan did apply for a ballot paper in his own name, but the gravamen of the charge is that he voted oftener than by law he had the right to do, in violation of sec. 158*a*. The application for the ballot paper being a necessary preliminary to having voted, the penalty therefor prescribed by sub-sec. 3 of sec. 193 does not apply to the wrongful voting; nor is there any other penalty or mode of punishment expressly provided by law; so

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that the offence of having wilfully voted more than once without lawful excuse is wilfully doing an act which sec. 158a of the Municipal Act forbids, and the accused under sec. 138 of the Code is guilty of an indictable offence.

Every contempt of a statute is indictable where no other punishment is limited: 2 Hawk. P.C., ch. 25, sec. 4; 5 Burn's Justice, p. 730; and when a new offence is created by one clause of an Act, and a penalty annexed by a separate and substantive clause, a prosecutor may indict on the clause creating the offence, and is not obliged to sue for the penalty: *Rex v. Harris*, 4 T.R. at p. 205; see also *Rex v. Wright* (1758), 1 Burr. 544; 2 Hawk. P.C., ch. 25, sec. 4; 1 Russell on Crimes, 6th ed., p. 199 *et seq.* These cases all refer to new offences, or to offences which Parliament had the power to create, but in this matter the Legislature of Ontario has not the power to create a new offence, except in cases where it prohibits the commission of an act, or where it declares an act shall be done or performed on a subject-matter over which it has jurisdiction. Here there is no question as to the power of the Legislature to enact the Municipal Act and to regulate elections thereunder, and to prescribe the penalty or forfeiture for a wilful breach thereof; if such penalty or forfeiture is prescribed, then it must point out by what means it is to be enforced, and that alone is the remedy, and an indictment will not lie. Here there is no penalty or other mode of punishment, and therefore the case comes within sec. 138 of the Code. In the case of *Regina v. Wason*, 17 A.R. at p. 242, much relied upon by Mr. DuVernet (although not on this point), Osler, J.A., in reference to the Act under discussion there, says: "But for the punishment which the Act itself imposes for its breach, its sanction would have been found in that provision of the Dominion Act, R.S.C. ch. 173, sec. 25 (now sec. 138 of the Criminal Code), which enacts that any violation of a provincial statute shall be deemed a misdemeanour and punishable accordingly. Or possibly if the penalty had not been recoverable before justices on summary conviction, the remedy would have been given in sec. 8, sub-sec. 31, R.S.O. 1887, ch. 1, the Interpretation Act." In this matter, however, the Interpretation Act would not apply, for the reason that a pecuniary penalty of forfeiture is not imposed, so that

its sanction is only to be found in the 138th section of the Code. I am, therefore, of opinion that the police magistrate had jurisdiction to take the information in question, and to issue a summons to Meehan to appear and answer the charge; and to hear and determine whether there was a case made out to warrant a committal for trial, etc.; and, moreover, that he was bound to do so, and being so bound, I cannot see how I can decline to make the order absolute. Whatever may be urged in mitigation of the offence charged is not the question before me. It is not a case in which the magistrate, after hearing the facts, *exercised a discretion, which he certainly would have a right to do*, and had refused to take or receive the information: he himself says, in his affidavit filed, that he had considered the question of jurisdiction fully, and had decided in a former case "That I had no jurisdiction either to dispose of the case summarily, or to hold a preliminary investigation and determine whether the defendant should be committed for trial, or not." He did not exercise any discretion at all as to the facts; he came to the conclusion that he had no jurisdiction to consider them, which is a question of law. If he had considered the facts and exercised a discretion upon that state of things, then there might be something in the objection urged by Mr. DuVernet. Where justices entertained an application for a summons for a criminal offence, and have considered the material on which the application is based, and refused to hear more, or to grant the summons, the High Court will not interfere by mandamus to order them to hear again: *Ex parte MacMahon*, 48 J.P. 70. This was an application for a mandamus to a magistrate to exercise his jurisdiction in granting summonses against five persons for the crime of wilful and corrupt perjury. In giving judgment Lord Coleridge said: "If he, the magistrate, has not exercised his jurisdiction, this court will compel him to do so, for parties have a right to his exercise of that jurisdiction, and he has no right to refuse to do so. But if it has been exercised, however erroneously, this court, which is not a court of appeal from the magistrate, has no power whatever to correct or review his exercise of his jurisdiction." He appears to have stated that he refused the application for the summons because he was

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satisfied after reading the information that the charge of wilful perjury was not made out; that is, that the statements made by the accused were not wilfully false. If that was not an exercise of discretion on the facts before him, I am at a loss to understand what would be.

In my judgment, before a magistrate can exercise his discretion, he must have jurisdiction to entertain the case, and must have been put in possession of the facts on which he can exercise discretion; but here the police magistrate did not place himself in the position to so act: he felt and considered that he had no jurisdiction to entertain the case, and refused on that ground to take the information or grant the summons. Now that is the point where, according to Lord Coleridge, he was in error, and being in error in that regard, "this court will compel him to correct the error, because parties have a right to the exercise of that jurisdiction." "There is a broad distinction between magistrates declining to exercise jurisdiction and exercising it honestly, but erroneously," *per* Mathew, J., in the same case. If the duty is of a judicial character its performance will be enforced only where it has been refused, and not where it has been improperly performed: *Regina v. Middlesex Justices* (1839), 9 A. & E. 540, at p. 546. I also refer to *Regina v. Richards* (1851), 20 L.J.Q.B. 351; *Rex v. Yorkshire Justices* (1823), 2 B. & C. 286, at p. 291; *Regina v. Worcestershire Justices* (1854), 3 E. & B. 477.

It follows from all this that the police magistrate, in my judgment, has misconstrued the statute in coming to the conclusion that he has no jurisdiction, and it is my duty to make the order absolute; as to which see *Regina v. Cloete* (1890), 64 L.T.N.S. 90; *Regina v. Fawcett* (1868), 11 Cox C.C. 305.

A great number of very technical objections were taken, all of which I have considered, with the cases cited in support thereof, but no one, in my judgment, was of any force; nor could I give effect to them: the only reason assigned by the police magistrate himself was the want of jurisdiction. It was not because the fees for taking the information, or for granting the summons, or any matter of that kind, were not tendered to him, etc.; and it would be absurd to obstruct the wheels of justice by giving effect thereto. The act required of the police



magistrate was a judicial act, and not ministerial, as was the case in *In re Township Clerk of Euphrasia*, 12 U.C.R. 622, cited in support of the objection that the applicant had not tendered to the police magistrate the fees to which it was claimed by counsel he was entitled; and, moreover, I do not think that fees could properly be demanded in this case, as the proceedings could not be dealt with summarily. The magistrate should take the information, grant the summons, and if in his opinion the charge was made out, the accused should be committed for trial, or bailed to appear and answer; if, on the contrary, the magistrate should be of opinion that the act was not "wilfully" committed, but under a misapprehension of the law, I do not think he would be bound to commit on the authority of *Ex parte MacMahon*, before referred to.

Nor do I think, since the passing of the Act to protect justices of the peace, R.S.O. 1897, ch. 88, sec. 6, under which the rule *nisi* was granted in this case, that the Courts are so much restricted as formerly in regard to granting the writ of mandamus. This provision is supplemental to that of the authority to grant the prerogative writ. Nor do I think the fact that the information tendered to the magistrate stated the offence charged as being contrary to the common law would justify the police magistrate in refusing to take the same; nor does it appear that such entered into his consideration. Now, by the procedure under the Code, Part 46, any allegation as to whether the offence charged is contrary to the statute law or the common law is not necessary, and if stated as it was in this information, the words "contrary to the common law" may be treated as surplusage.

The only question now undisposed of is as to the costs of this motion. It appears that a rule *nisi* was first applied for to a Divisional Court, and was granted; when cause was shewn, it came up before a Divisional Court composed of other Judges, and the objection was taken that the rule should have been applied for to a Judge sitting in single court: that objection was noted, but the argument was continued on the merits, and was very fully gone into by counsel for both parties, and judgment was reserved. The objection to the jurisdiction of the Divisional Court was afterwards disposed of in favour of the

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objection (see *ante* p. 361), but the Court stated as the whole case had been very fully argued, if the parties would consent, one of the Judges who heard the case would sit as in single court, and give judgment on the merits, and gave the parties a week to file a consent to that effect. The applicant was willing to consent, but the respondents, through Mr. DuVernet, declined; whereupon the objection was given force to, without prejudice to another application being made in single court, and the rule *nisi* was dismissed without costs. Subsequently the rule *nisi* was granted in single court, and, after several adjournments or enlargements, it came before me. The best part of two days was then exhausted in the re-argument, all of which I think is to be very much regretted; it was an unreasonable waste of valuable time, and would be sufficient, in my judgment, to warrant me in ordering the costs to be paid by the respondents. But, on the other hand, I am satisfied that the police magistrate acted in perfect good faith; and although the respondent Meehan, through his counsel, had a perfect right to oppose the motion by all legitimate means, the refusal to act on the suggestion of the Divisional Court has had the effect of putting the applicant to unnecessary expense. Besides this, a number of affidavits were filed on behalf of the accused, but not one by himself, which were entirely apart from the real question, shewing what the law had been at the election for the previous year; and from which it was desired to be inferred that it was not a wilful breach of the amended law, but an innocent oversight in not recognizing the change that had been made by the amending section 158a. On this motion, my judgment could not be affected by that fact, whatever force the police magistrate may give to it on hearing the case. I do not see, therefore, how I can avoid ordering the respondent Meehan to pay the applicant's costs.

I have to express my thanks to Mr. Cartwright, K.C., Deputy Attorney-General, who, as *amicus curiæ*, referred me, upon the argument, to a number of most important cases bearing on the question.

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## [IN THE COURT OF APPEAL.]

TUCKETT-LAWRY V. LAMOUREAUX.

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*Will—Annuity—Ademption—Evidence.*

A testator gave by his will to each of two daughters an annuity for life of \$6,000. After making the will he gave to one daughter absolutely bonds sufficient to produce an income of a little more than \$1,200 a year, and by a codicil reduced her annuity by that amount. He subsequently also gave to the other daughter absolutely bonds sufficient to produce an income of a little more than \$1,200 a year, and instructed his solicitor to alter his will so as to reduce her annuity by that amount. He died suddenly and the will was not altered:—

*Held*, that the doctrine of ademption applied and that notwithstanding the different nature of the two gifts, and even without the evidence of intention, the second daughter's annuity must be treated as reduced pro tanto.

*Held*, also, however, that the evidence of intention was admissible and was conclusive.

Judgment of Ferguson, J., 1 O.L.R. 364, affirmed.

AN appeal by the plaintiff from the judgment of Ferguson, J., reported 1 O.L.R. 364, was argued before ARMOUR, C.J.O., OSLER, MOSS, and LISTER, JJ.A., on the 23rd and 24th of January, 1902. The important facts are stated in the report below, and a letter, upon which stress was laid in this Court as evidence of the donor's intention that the gift in question should be taken by way of additional bounty, is set out in the judgment of MOSS, J.A. Some cases in addition to those mentioned in the report below were cited on the argument in this Court, among them being *Robinson v. Whitley* (1804), 9 Ves. 577; *McClure v. Evans* (1861), 29 Beav. 422; *Ford v. Tynte* (1864), 2 H. & M. 324; *In re Fletcher, Gillings v. Fletcher* (1888), 38 Ch. D. 373.

*Martin*, K.C., and *Aylesworth*, K.C., for the appellant.

*Shepley*, K.C., and *E. H. Ambrose*, for the respondents.

April 12. ARMOUR, C.J.O.:—This is, in my opinion, a very plain case.

The father of the plaintiff by his will gave to the plaintiff an annuity of six thousand dollars during her life. Subsequently to the making of his will he invested a sufficient sum in her name to give her an annual income of twelve hundred dollars.

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Upon these facts the presumption arose that it was not his intention that she should have both portions, and it did not the less arise by reason of the gift made by the will being for life only, while the investment was an absolute gift.

This presumption was, however, rebuttable, and the onus was upon the plaintiff of rebutting it, and this she attempted to do by the evidence of letters written by her father to her, but this evidence was not inconsistent with the presumption, and was met by evidence, properly admitted, of declarations by her father which shewed conclusively that it was not his intention that she should have both portions.

The appeal should, therefore, be dismissed with costs.

MOSS, J.A. :—George E. Tuckett, late of the city of Hamilton, having by his will, dated the 11th of November, 1896, made provision for his daughter, Adeline Myrtle Lawry (the plaintiff), by directing the defendants, whom he appointed the trustees of his will, to pay her out of the income of his residuary estate an annuity of \$6000 during her life, afterwards purchased permanent interest bearing securities yielding an income of \$1,200 per annum, and caused such securities to be transferred to and vested in the plaintiff. In letters advising her of the purchase and settlement upon her of the securities, he took pains to impress upon her that his purpose was to provide her with a secure income of \$1,200 a year, and he expressed a most anxious desire that she would not allow any one to persuade her to part with the securities, warning her against the dangers of changing them for others bearing higher interest but of less secure quality.

Upon his death the plaintiff claimed to be entitled to receive from the defendants the sum of \$6000 annually during her life. The defendants answered that the yearly payment under the will was reduced to \$4,800 by the testator's action in providing the plaintiff with securities producing an income of \$1,200, and thereupon this action was brought. There was evidence of declarations made by the testator to others, the general tendency of which is to shew that his intention was to treat his gift to the plaintiff as a part fulfilment of the provisions of the will.



The learned trial Judge decided that there was an ademption *pro tanto*, and the plaintiff now appeals.

The will is so framed as to apparently exclude any contingency in which the testator's daughters could derive any benefit under it other than the payment of the annuities of \$6000. A codicil gives the plaintiff a parcel of land, but the testator afterwards conveyed this to her absolutely. The will, therefore, gives her no interest in or claim upon the estate beyond the annuity. It was manifestly the testator's intention to limit his daughters' share or portion of his estate to an income during their lives. It was the sole provision he made for them out of the estate affected by the will, and to that extent he burdened his residuary estate for their benefit.

If he had died without anything more being done, the plaintiff's rights would have been clear. She would have been entitled to receive \$6000 per annum during her life, if the residuary estate was sufficient to bear in full that and the other burdens imposed upon it. But the testator in his lifetime withdrew from his estate a sum sufficient to purchase permanent securities yielding a yearly income of at least \$1,200 and vested them in the plaintiff. She was thus provided with an income of that amount, secured against any contingencies to which estates are subject. This I take to be the meaning he intended to convey to the plaintiff in his letter of the 23rd of October, 1899, when he wrote: "It is my intention as soon as I can to purchase enough debentures to make the interest up to twelve hundred dollars a year for you, so that at my death you will have that interest sure independent of lawyers or executors, and it is my wish you allow no one to persuade you to part with one of them."

This act of the testator was an act of bounty as much as the provision in the will, and it was of the same nature. I think it must be held to fall within the rule as stated by Kay, L.J.: "That if there are two provisions, the one made by the will and the other in the lifetime of the testator, or what, in equity, are ordinarily called portions, there arises the presumption that one portion is given in part satisfaction of the other:" *In re Lacon, Lacon v. Lacon*, [1891] 2 Ch. at p. 501.

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It was strongly urged that there is a substantial difference in the nature of the two gifts sufficient, in the absence of evidence of intention, to rebut the presumption. The difference between the two is that as regards the sum producing the \$1,200, the plaintiff has the absolute power of disposing of it at any time, and if she chooses to disregard the testator's earnest wish to the contrary, she may deprive herself of the enjoyment of the income during the remainder of her life.

But the circumstance that the limitations of the portions differ is not sufficient to prevent the application of the principle of ademption: *Durham v. Wharton* (1836), 3 Cl. & F. 146, 10 Bli. N.S. 526; *Twining v. Powell* (1845), 2 Coll. 262.

The oral evidence, so far from rebutting the presumption, fortifies the intrinsic evidence derived from the nature of the two provisions, and aids the view that the testator intended that the provision made in his lifetime should go in part satisfaction of the provision made by the will.

It was submitted on behalf of the plaintiff that at all events the learned Judge should have directed the costs up to judgment to be borne by the testator's estate. There are difficulties in the way of so disposing of them. The parties interested in contesting this claim, viz., those beneficially entitled to the residue, are not before the Court. The plaintiff is not entitled to any part of the residue, and so no part of the burden would fall upon her. The proceedings were not intended to benefit and have not benefited the other beneficiaries, or the estate to which they are entitled. If the learned trial Judge had seen fit to order the defendants to pay the plaintiff's costs out of the estate, we might not have interfered: *Kirby v. Bangs* (1900), 27 A.R. 17, 31. As the case stands, we do not interfere with the disposition he has made of them.

OSLER, J.A.:—I agree with the judgment of my brother Moss.

LISTER, J.A., died before the delivery of judgment.

*Appeal dismissed.*

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## [IN THE COURT OF APPEAL.]

## ANDERSON V. MIKADO MINING COMPANY.

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*Master and Servant—Non-observance of Rules—Mines Act.*

April 12.

A master is entitled to make and insist on the observance of reasonable rules for the conduct of his business, and if in consequence of the non-observance of these rules by a servant, he is injured, the master is not liable.

It was held in this case that the master was not liable in damages for the death of the servant resulting from the servant using in direct violation of rules the cage instead of the ladders to ascend from a mine, although the ladders did not in some particulars conform to the requirements of the Mines Act.

Judgment of Robertson, J., reversed.

APPEAL by the defendants from the judgment at the trial, in an action by the widow of a miner to recover damages for his death.

The following statement of the facts is taken from the judgment of ARMOUR, C.J.O.:—

The defendants were a mining company having their head office in London, England, and their managing director was a Mr. Deacon, who lived at Rat Portage, near which the defendants' mine was situated, and who held the position of the local board for Canada, and had authority over all the defendants' business in Canada.

The shaft of the mine was two hundred and forty feet in depth, and had a horizontal area of about seven feet by eleven feet for the first one hundred and twenty feet from its mouth, and of about seven feet by nine feet for the next one hundred and twenty feet.

There were two levels, one at one hundred and twenty feet from the mouth of the shaft and the other at two hundred and forty feet, and the shaft was divided into two compartments, one of which contained ladders designed and intended for the men employed in the mine to go down and up by to and from their work, and this was boarded off, and there was a door at each level. The ladders appear to have been of different lengths, of twenty feet and less, and were fastened by timbers on the side of the shaft and rested on platforms, the first ladder from the mouth of the shaft being perpendicular and the first one below the one hundred and twenty feet level—a ladder seven feet

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long—being also perpendicular, and all the other ladders were inclined, and all the ladders were in good condition.

The other compartment contained a James Cooper Manufacturing Company's standard cage called "The Improved Safety Cage," designed and intended only for carrying materials up from and down to the mine, and not designed or intended for carrying men up from or down to the mine.

The platform of this cage was four feet six inches in length by three feet in width, and there was an upright from each end of the platform secured by braces from each corner of it; those uprights were about seven feet in length and were joined at the top by a cross bar to which was attached a steel cable operated by steam power situated about twenty-five feet from the mouth of the shaft. At the mouth of the shaft there was a man stationed called a lander, and near him a bell which could be sounded from each level, and there was also a bell at the steam power which could be sounded by the lander, and by means of these bells the movements of the cage were directed.

There was a chain with a hook at one end and a ring at the other, fastened by its middle to one of the uprights at the distance of three feet and eleven inches from the platform, for the purpose of securing things sent up from or down to the mine. This chain was there at the time of the accident to the deceased, and after the accident a chain was attached to each upright at a distance of about six feet and a half from the platform for the purpose of securing things sent up from or down to the mine of a greater length than could be secured by the chain which was attached to the upright at the time of the accident. The sides of this compartment were not planked, but there were timbers around it at the distance of about five feet apart, and the cage in running up and down would run at the distance of sometimes an inch and sometimes five inches from these timbers.

The deceased was working as a helper in a drift at the two hundred and forty foot level, and the drills with which the work was being done belonged to the defendants and it was their duty to sharpen them, but it was the deceased's duty to see that they went up to be sharpened at the blacksmith's shop near the mouth of the shaft and that they were sent down again after being sharpened.



At 11.30 a.m. of the day of the accident the deceased and three others got upon the cage, after having placed thereon several short drills, and the deceased carried in his hand a drill about five feet long, all these drills being taken up for the purpose of being sharpened, and after the cage had got a short distance past the one hundred and twenty foot level the end of one of the drills, which was lying on the platform, came in contact with one of the timbers at the side of the compartment, and in some way caused the deceased, who was standing at the corner of the platform, to lose his balance, and he was in some way crushed between the cage and the timber and injured to such an extent that he died in consequence.

The tools of the workmen were properly sent up and down on the cage, but it was well known to all the men working at the mine that the cage was not designed or intended to carry them, and it was contrary to the rules of the defendants, as the men all knew, that they should go up or down on the cage, and the following notice was posted at the mouth of the shaft: "It is strictly forbidden for any person to use the bucket or cage in ascending or descending the shaft. By order of the Manager."

It appeared in evidence that by the ladders was the safer way to go down to and up from the mine, but that the miners came up and went down by the cage whenever they got the chance, it being the easier way, and that the mine captains did the same thing and were aware of the miners doing it, although they never expressly assented to their doing so.

But there was no evidence that the managing director ever assented to the rule not being observed, but, on the contrary, that he gave instructions that it should be observed.

It was said that long drills could not be taken up on the cage without being tied and that the defendants did not supply material to tie them with, but no complaint was made that such material was not supplied, and it was said that material fit for the purpose was lying about which might have been used.

The action was tried at Rat Portage in September, 1900, by Robertson, J., who gave judgment for the plaintiff for \$2,250 and costs, and from this judgment the defendants appealed.

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The appeal was argued before ARMOUR, C.J.O., OSLER, MOSS, and LISTER, JJA., on the 20th and 21st of January, 1902.

*Aylesworth*, K.C., and *N. W. Rowell*, for the appellants. The accident would not have happened if the deceased had obeyed the rules of the company and no liability arises: *Kansas and Arkansas R. W. Co. v. Dye* (1895), 70 Fed. Rep. 24. The evidence does not justify the findings that the use of the cage by the miners for ascending was acquiesced in: *Harrison v. North Eastern R. W. Co.* (1874), 29 L.T. N.S. 844; or that the ladders were unsafe and defective. At any rate the deceased was guilty of negligence in the mode in which he held the tools, and this was the cause of the accident: *Senior v. Ward* (1859), 28 L.J.Q.B. 139; 1 E. & E. 385.

*Clute*, K.C., and *A. R. Clute*, for the respondent. The deceased was not violating any rule in using the cage. The tools had to be taken to the surface to be sharpened, and some person had to be in the cage to keep them from falling off. The alleged rule against the use of the cage is not proved, and there is no evidence that the deceased knew of it. It had never been enforced and the use of the cage was acquiesced in. It is clear, too, that the ladders were not in accordance with the requirements of the Mines Act, and the miners were, therefore, not bound to use them, but were entitled to avail themselves of any other means of ascent. See *Warmington v. Palmer* (1900), 7 B.C. Rep. 414; *Parent v. Schloman* (1897), 12 Q.R. 283; *Northern Pacific R. W. Co. v. Nickels* (1892), 4 U.S. App. 369; Thomas on Negligence, p. 824; 14 Am. & Eng. Encyc., 1st ed., p. 908.

*Aylesworth*, in reply.

April 12. ARMOUR, C.J.O.:—I am unable to agree with the learned trial Judge, and I think that his judgment should be reversed.

There was in my opinion no negligence of the defendants causing the death of the deceased. The cage, as the deceased knew, was not designed or intended to carry the men going down to or returning from their work, and the defendants, therefore, owed no duty to the deceased either in respect of the construction of the cage or in respect of the construction of the

compartment up and down which it ran : *Felch v. Allen* (1868), 98 Mass. 572.

It was said that by reason of the defective condition of the ladders the deceased was obliged to use the cage, but the evidence does not warrant any such statement, for it shews that the ladders were in good condition, and the mere fact that two of them were not placed as required by the Mines Act, of which no complaint was made, did not authorize the deceased to violate the rule of the defendants in going up by the cage, and no such reason is assigned by the evidence for his doing so.

It was said also that the drill he was taking up in his hand required to be tied and that there was nothing furnished by the defendants by which it could be tied if sent up by the cage, and that he was, therefore, obliged to go up in the cage with it in order to take it up to have it sharpened, but it was not shewn that he had ever applied for material with which to tie it, and even if there was no material with which to tie it, this did not warrant his violation of the rule in going up by the cage.

Besides, it appears to me that the drill he was carrying in his hand, being only about five feet long, could have been properly secured by the chain which was attached to the upright at the distance of three feet and eleven inches from the platform.

The death of the deceased arose from his own act in going up by the cage in violation of the rule of the defendants, and the defendants, therefore, cannot be made responsible for it : *Senior v. Ward*, 1 E. & E. 385.

The learned Judge found that "it was against the wish of the defendant company for any person to use the bucket or cage in ascending or descending the shaft and that a printed notice to the above effect was kept posted up over the mouth of the shaft, but that this notice was habitually disregarded by both officers and men." "And in regard to the using of the cage" he found that "the officers in charge of the mine were constantly in the habit of disregarding the rule as to ascending the shaft, and that they were continually being accompanied by the men while so doing." He also found that "the rule of the defendant company, prohibiting persons from descending and

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ascending by the cage, was habitually disregarded by the officers in charge of the mine, and by the workmen employed therein, to the knowledge of the captains and other overseers and officers in charge of the works at said mine."

But the habitual disregard of the rule in *Senior v. Ward* by the defendant did not serve to excuse the deceased for his violation of it.

It was contended, however, that "if in practice a rule is violated with the knowledge of the master or of those who represent him it will be regarded as abrogated or modified," citing Thomas on Negligence, p. 824, and the cases in the United States there referred to, the most authoritative of which is *Northern Pacific R.W. Co. v. Nickels*, 4 U.S. App. 369. In that case a brakesman was injured while coupling a car, and on the trial an instruction was asked of the Court to direct a verdict for the defendant on the ground of the contributory negligence of the plaintiff in refusing to use a stick in making such coupling as required by the rule of the company, which instruction was refused and the matter of negligence submitted to the jury. There was testimony tending to shew that the rule was universally disregarded and that the superintendent of the road was fully aware of its constant violation, and it was held that, under the circumstances, the jury were at liberty to consider whether the rule was not in effect abrogated. The Court thus disposed of the question: "To hold that this defendant company could make this rule on paper, call it to plaintiff's attention, and give him written notice that he must obey it and be bound by it on one day, and know and acquiesce without complaint or objection in the complete disregard of it by the plaintiff and all its other employes associated with him on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty toward the plaintiff because he disregarded this rule, would be neither good morals nor good law. Actions are often more effective than words, and it will not do to say that neither the plaintiff nor the jury was authorized to believe from the long continued acquiescence of the defendants in the disregard of this rule that it had been abandoned, that it was not in force."



The superintendent in that case was in charge of a great division of the defendants' railroad, comprising hundreds of miles.

In the case in hand no acquiescence by the managing director in the disregard of the rule which the deceased violated was found by the learned Judge or shewn by the evidence.

And in *Atchison, etc., R.W. Co. v. Reesman* (1894), 19 U.S. App. 596, before Mr. Justice Brewer, of the Supreme Court, and Mr. Sanborn, the circuit Judge who delivered the judgment in *Northern Pacific R.W. Co. v. Nickels*, Mr. Justice Brewer, in delivering the judgment of the Court, said (p. 609): "The question has not infrequently arisen, whether knowledge and assent on the part of the conductor or other official on a train of a violation of one of the rules of the company by a passenger relieves the latter from the burden of contributory negligence arising from such violation, and the response has almost uniformly been in the negative. It is true that in those cases the person injured was not an employé, subject to the control of the officer whose knowledge and assent to the violation was relied upon as an excuse, but the principle underlying is the same. The question is not one of obedience to orders, but of compliance with rules, and, generally speaking, the duty of compliance is not waived by the mere fact that some controlling official has knowledge of the failure to comply. . . . It may be laid down as a general rule that the mere knowledge and assent of his immediate superior to a violation by an employé of a known rule of the company, the employer, will not, as a matter of law, relieve such employé from the consequences of such violation." See also *Railroad Co. v. Jones* (1877), 95 U.S. 439; *Kansas and Arkansas R.W. Co. v. Dye*, 70 Fed. Rep. 24.

In my opinion, therefore, the appeal must be allowed with costs and the action dismissed with costs.

OSLER, J.A.:—It is the right, no less than the duty, of an employer to make reasonable rules for the conduct of his business, having regard as well to his own convenience as to the safety of those employed by him, and it is the duty of the latter accepting the employment to obey the rules imposed upon

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them. If a servant, for his own convenience or other motive, breaks a rule of that kind, and in doing so meets with injury or accident, that is something for which the law gives him no remedy against his employer, since his misfortune has not happened in consequence of any breach of the master's duty towards him but the contrary: *Lake Erie R.W. Co. v. Craig* (1897), 80 Fed. Rep. 488. It may be assumed that rules when made are meant to be obeyed, but desuetude may render them obsolete, or they may turn out to be difficult or very inconvenient to observe in the ordinary course of carrying on business, and the employer may tacitly treat them as abrogated by overlooking and not calling his servants to account for their breach. In such cases they may become practically non-existent and the duty of the servant then ceases to be controlled by them. The onus is nevertheless on the servant to shew that a rule, the application of which he wishes to get rid of, has been waived or abandoned by a course of conduct inconsistent with its existence known to and tacitly or expressly assented to by the employer.

In the case at bar the deceased met with a fatal accident while ascending from the bottom of the mine to the surface in a cage or unenclosed platform hauled through the mine shaft. This was intended exclusively for the purpose of sending up and down the workmen's tools when in need of sharpening, or ore or other material, and for the purpose of inspecting the shaft when that was necessary to be done. It was neither constructed nor intended to be used by the defendants' workmen in the course of their daily business, for it was admittedly unsafe and unsuitable, and a safe, convenient and usual way was provided for them by means of ladders. The defendants allege and prove that there was a rule of the company posted in places where it could not fail to be seen strictly forbidding the men to use the bucket or cage when ascending or descending the shaft. The men were proved to have known this rule, and they had been frequently warned to obey it, and in particular there was evidence that the deceased had only a few days before the accident been warned that the use of the cage was forbidden. It was also shewn that, in spite of the notice and of the warnings given by the subordinate officials of the company, the

men would persist in ascending the shaft in the bucket or cage when they had an opportunity of doing so, as they could thus reach the top more quickly. It does not appear that they were in the habit of descending the shaft in that way, as the person in charge of the engine at the top would not lower the bucket for them. The signal from below could not safely be disregarded, and of this the workmen took advantage when they could. It seems to me, after a careful perusal of the evidence, that the plaintiff has failed to prove that any such course of conduct existed, known to the manager of the defendants, or which ought to have been known to him, from which it ought to be inferred that the rule had been abrogated or that permission had been tacitly given to the men to cease to observe it. The injury which the unfortunate deceased met with arose from his deliberate disobedience of the rule, and it ought, in my opinion, to have been held that on this ground the plaintiff had no right of action. The appeal must, therefore, be allowed and the action dismissed.

MOSS, J.A., concurred.

LISTER, J.A., died before the delivery of judgment.

*Appeal allowed.*

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## [IN THE COURT OF APPEAL.]

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April 10.

## HOSPITAL FOR SICK CHILDREN V. CHUTE.

*Will—Construction—Power of Advancement—Division of Estate in pursuance thereof.*

A testatrix by her will directed her trustees to pay an annuity to each of her three children, and empowered the trustees "from time to time to make such advances as they may deem proper out of the corpus or income or both of my estate for the benefit of or to my said children or any one or more of them either on their marriage or as an advancement in life or for any other purpose that may appear to them wise and reasonable." On the death of all the children of the testatrix the undisposed of residue was directed to be divided among their children then living, and in default of a grandchild living at the death of the last surviving child of the testatrix, then the undisposed of residue was to be divided among certain charities :—

*Held*, that a division of a considerable portion of the estate between two of the children, made by the trustees in good faith two years after the death of the testatrix, was a valid exercise of the power.  
Judgment of BOYD, C., affirmed.

APPEAL by the plaintiffs from the judgment at the trial.

The following statement of the facts is taken from the judgment of MOSS, J.A. :—

Agnes Bilton, of the city of Toronto, widow, died in April, 1894, leaving two sons and one daughter, viz., the defendants Harold Bilton, Frank Bilton, and Naomi Bilton, and considerable real and personal property. By her will and codicil, dated respectively the 3rd and 21st of March, 1894, she gave and bequeathed to her two sisters, the defendants Agnes Chute and Eliza Chute, all her real and personal estate, upon trust, and appointed them executrices and trustees. She empowered them to sell and dispose of such portions thereof as they might think proper and to invest and reinvest the proceeds in such securities as they might think proper. She gave to her two sisters a legacy of \$7,500, to the plaintiffs a legacy of \$1,000, to the Diocese of Algoma for missionary purposes a legacy of \$1,000, and to her daughter Naomi the piano in the dwelling house. She directed her trustees to apply an annuity of \$600 a year for the use of her son Harold during his life, to pay an annuity of \$600 a year to her son Frank during his life, to apply an annuity of \$750 a year for the use and benefit of her daughter Naomi during her life without power of anticipation, to pay to



Martha Jane Dodd, her niece, \$200 a year during her life, and to pay to Eliza Wilmott \$100 a year during her life.

The will contained the following provisions: "11. I hereby empower my trustees from time to time to make such advances as they may deem proper out of the corpus or income, or both, of my estate for the benefit of or to my said children, or any one or more of them, either on their marriage or as an advancement in life, or for any other purpose that may appear to them wise and reasonable. I do not desire that my trustees should consider this to be obligatory upon them, nor that my children should consider that they can compel my trustees to make any such advances or payments. I leave this entirely in the discretion of my trustees, desiring that they should take my position in regard to my children and deal with them as they think under all the circumstances may be in their true interest.

12. On the death of all my children I direct that all the rest, residue and balance of my estate then undisposed of shall be divided in equal shares between all their children, they taking per capita and not per stirpes. If, however, at such period of distribution, that is, at the date of the death of my last surviving child, there should be then no grandchild of mine living, then I direct that all such rest, residue or balance of my estate shall be handed absolutely over in equal shares to the five charities following, that is to say, the Hospital for Sick Children in the city of Toronto, the Sackville Street Branch of the Toronto Mission Union, the Diocese of Algoma for its missionary purposes, the Young Women's Christian Guild of the city of Toronto, the Prison Gate Mission or Haven, situate on Seaton street in the city of Toronto, each of the said charities thus getting one-fifth of such rest, residue or balance of my estate."

Probate of the will and codicil was duly granted to the executrices named therein and the debts and pecuniary legacies were paid in due course of administration.

At the date of the will all the children were over twenty-one years of age, Harold being in his 29th, Frank in his 27th, and Naomi in her 24th year. Harold was of weak intellect and under restraint, and the defendants Agnes Chute and Eliza Chute are now the committee of his person and estate.

All three children of the testatrix are unmarried.

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By deed dated the 30th July, 1896, made between the trustees of the first part and the defendant Naomi Bilton of the second part, after reciting the will and the power to make advances and that the trustees, exercising the discretion reposed in them under the will, had decided to grant and convey the premises thereafter described to the defendant Naomi Bilton in pursuance of the said power, the trustees granted to her in fee simple a parcel of land on Yonge street belonging to the estate of the testatrix. And it was therein declared that nothing therein contained was to be construed as in any way affecting her right to the annuity or specific legacies expressly directed to be paid to her under the will.

On the same day the trustees made a bill of sale of the household furniture belonging to the estate of the testatrix to Naomi Bilton, with recitals and a proviso similar to those in the deed of land. On the 5th of August, 1896, the defendant Naomi Bilton, being about to depart for Europe, where she contemplated remaining for a considerable period, gave to the defendants Agnes Chute and Eliza Chute a general power of attorney for the collection of her moneys, rents, etc., and the management of her affairs. She returned in the latter part of 1898, and has since resided with her co-defendants Agnes Chute and Eliza Chute and Frank Bilton.

On the 28th of November, 1898, the trustees, by deed, reciting the powers reposed in them under the will and that with a view to Frank Bilton's welfare and advancement in life they had decided to grant and convey to him certain lands belonging to the estate, granted three parcels to him in fee simple. On the same day Frank Bilton conveyed these parcels to the same persons, in trust, to pay the rents, profits, or income therefrom to him during his life or, in their discretion, to him and his children (if any), or to his children alone, in such shares or proportions as they should see fit; to appoint from time to time any part of the lands, or the proceeds derived from sales, to Frank Bilton, or to him and his children, and in default of appointment the land to vest in him or, in the event of his death before appointment, in his children (if any) in such shares as he should by deed or will appoint, and in default in the children in equal shares. The deed also contains a power to sell or

exchange and to raise money by way of mortgage for the purpose of building on any portion of the land, and to lease the land with the buildings; also a power of revocation of the trusts by Frank Bilton with the consent of the trustees.

In the months of December, 1898, and January, 1899, Frank Bilton purchased and obtained assignments from Eliza Wilmott and Martha Jane Dodd, of the annuities to which they were entitled under the will. In October, 1899, Naomi Bilton made a bill of sale of the household furniture to Agnes Chute and Eliza Chute to hold upon trusts for the benefit of Frank Bilton and his children (if any) similar to those in the deed from Frank Bilton of the 28th of November, 1898.

In October and November, 1899, the trustees made other conveyances and transfers of lands, mortgages, moneys and other personal effects belonging to the estate of the testatrix to the defendant Frank Bilton, all of which were reconveyed, transferred and assigned to them to hold upon trusts similar to those expressed in the deed of the 28th of November, 1898.

On the 11th of October, 1899, the defendant Naomi Bilton surrendered all her claim to her annuity of \$750 under the will and released the trustees from all liability in respect thereof, and on the 23rd of October, 1899, the defendant Frank Bilton surrendered all his claims to his annuity of \$600 and the annuities of Eliza Wilmott and Martha Jane Dodd and released the trustees from all liability in respect thereof.

The result of these transactions appears to be that there has been transferred to or for the benefit of Frank Bilton property of the estate of the estimated value of \$45,000 and producing a net income of about \$1,500 per annum; that there has been transferred to or for the benefit of Naomi Bilton property of the estate of the estimated value of \$33,000 and producing a net income of about \$1,050 per annum; that the trustees yet hold property of the estate of the estimated value of \$21,000, yielding an income sufficient to secure the payment of the annuity of \$600 per annum given to Harold Bilton for his life, and that there are now no other charges upon the estate.

The plaintiffs, claiming as beneficiaries under the will in the event of there being no grandchildren of the testatrix at the time of the death of the survivor of her children, attack these

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transactions, and seek a declaration and judgment that the deeds and transfers in question are void, that the exercise of the power of advancement is fraudulent and void, and that the estate transferred to the defendants Frank Bilton and Naomi Bilton belongs to the estate, and is subject to the will, of the testatrix.

They say that these dealings with the estate are beyond the limits of the power conferred by the will, that they are not an exercise of the power to make advances within the meaning of the will, but if they are within the limits of the power they are not a *bonâ fide* exercise of it, but have been made fraudulently and corruptly for the purpose of depriving the parties entitled in remainder of their interests. They also say that there was an intention to personally benefit themselves by putting the property in a position by which they might become entitled to it or some of it.

The action was tried at Toronto before BOYD, C., who dismissed it, and the plaintiffs' appeal was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 10th of June, 1901.

*S. H. Blake, K.C., and James Bicknell*, for the appellants. The power is not in its terms wide enough to authorize what has been done. The general words must be read in connection with the specific cases provided for, and it is only when one of the specific cases arises that the power can be exercised. The use of the word "advances" shews that a general absolute division was not intended. Even if the power is wide enough, there has not been a *bonâ fide* exercise of it: *Pryor v. Pryor* (1864), 2 DeG. J. & S. 205; *Portland v. Topham* (1864), 11 H.L.C. 32; *Wellesley v. Mornington* (1855), 2 K. & J. 143; 1 Jur. N.S. 1202; *In re Porter's Settlement* (1890), 45 Ch. D. 179; *Humphrey v. Olver* (1859), 28 L.J. Ch. 406; *In re Bryant, Bryant v. Hickley*, [1894] 1 Ch. 324; *In re Hodges, Davey v. Ward* (1878), 7 Ch. D. 754; *In re Marsden's Trust* (1859), 4 Drew. 594; *In re Lofthouse* (1885), 29 Ch. D. 921; *Talbot v. Marshfield* (1867), L.R. 4 Eq. 661; Farwell on Powers, 2nd ed., pp. 46, 403, 457.



*W. H. Blake*, and *J. J. Lundy*, for respondents in the same interest.

*Macdonald*, K.C., and *F. C. Jones*, for the respondents, the trustees; *Shepley*, K.C., for the respondent, Frank Bilton; and *Riddell*, K.C., for the respondent, Naomi Bilton, contended that there was an absolute discretion which had been exercised in good faith, referring to *Tabor v. Brooks* (1878), 10 Ch. D. 273; *Brophy v. Brophy* (1873), L.R. 8 Ch. 798; *Gisborne v. Gisborne* (1877), 2 App. Cas. 300; Lewin on Trusts, 10th ed., p. 728; 27 Am. & Eng. Encyc., p. 140.

*Bicknell*, in reply.

April 10. ARMOUR, C.J.O.:—The judgment appealed from is, in my opinion, right and should be affirmed.

The power, the execution of which is attacked, is as follows. [The learned Chief Justice read it and continued]:—

The power so confided to the trustees is of very wide extent and, in my opinion, ample to justify what they have done, assuming it to have been done *bonâ fide* and without their being influenced by any improper motive.

The testatrix apparently supposed, as I gather from the language of the power, that the advances thereby authorized would be made in money, but as the trustees had power to convert the estate into money and were at liberty to make the advances either out of the corpus or income, or both, I do not think that their making the advances out of the unconverted estate can render such exercise of the power invalid.

They were at liberty to make such advances as they might deem proper, not only for the benefit of, but also to, the children of the testatrix, or any one or more of them, either on their marriage or as an advancement in life, or for any other purpose that might appear to them wise and reasonable, making them the judges of what was right and reasonable, and leaving the making of the advances entirely in their discretion, and desiring them to take her position in regard to her children and deal with them as they might think, under all the circumstances, might be in their true interest, thus again making them the judges of what might be in the true interest of the children.

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It is difficult to understand what language could have been employed giving to these trustees more complete and absolute discretion in the exercise of this power than is given to them by it.

The evidence shewed that the power was executed in good faith and not from any indirect or improper motive, and what gave rise to the contention that the power was exercised in favour of Frank Bilton from an indirect or improper motive was the fact that he, contemporaneously with the conveyances to him, reconveyed the property so conveyed to him to the trustees upon the trusts in the said reconveyances set forth.

But the evidence shewed that these conveyances were not the result of any bargain made with the trustees by which he was to obtain the conveyances made to him in consideration of his agreeing to make the reconveyances to them: *Pryor v. Pryor*, 2 DeG. J. & S. 205.

In my opinion the appeal should be dismissed with costs.

OSLER, J.A.:—An examination of the evidence and consideration of the arguments advanced and cases cited on the appeal confirms the opinion I formed at the hearing, viz., that the judgment of the learned Chancellor ought to be affirmed for the reasons stated by him. I have also had the advantage of reading the judgment prepared by my brother Moss, with which I agree.

I think that the appeal should be dismissed with costs.

MACLENNAN, J.A.:—I was much impressed by the argument of the appellants, but upon full consideration of the will and the evidence, I think the judgment is right. The power of the trustees to distribute the estate, whether corpus or income, between the children of the testatrix is as large as language could express it, and is practically unlimited; and it was only what should remain undisposed of that was to go to the charities. Therefore, although the effect of the advances made is to disappoint the expectations of the charities, that is not a ground for setting them aside.

I also agree that the other grounds of attack upon the several gifts and conveyances in question, namely, that the sole

purpose of making them was to defeat the charitable bequests, and that the exercise of the power was colourable and fraudulent, altogether fail for want of proof.

I therefore think the appeal should be dismissed.

Moss, J.A. :—The plaintiffs have completely failed to establish fraudulent intent or design. There is no evidence upon which it could be found that the instruments and dealings in question were made and entered upon for the purpose of defrauding any person entitled presumptively or contingently under the will or with the design of securing a benefit to the trustees themselves. No bargain or understanding of that nature can be gathered or inferred from the evidence. The learned Chancellor pointed out that as matters now appear upon the instruments, and having regard to the state of the family of the testatrix, there is not the remotest chance of either Agnes or Eliza Chute coming in for a share of the property. But even assuming that by possibility they might, that would not suffice for the plaintiffs' case. It is not enough for them to shew that as a matter of fact the exercise of the power may result in an advantage to the appointors or to others not objects of the power. They must prove an actual bargain to that effect between the appointors and the appointees: *In re Huish's Charity* (1870), L.R. 10 Eq. 5; *Pryor v. Pryor*, 2 DeG. J. & S. 205.

And the authorities establish that provided the power be well executed in other respects, the fact that it will disappoint other persons does not appear to be such an ill motive as to make the appointment a fraud on the power: see *Beere v. Hoffmister* (1856), 23 Beav. at p. 106.

The main question, therefore, is whether the terms of the power are such as to warrant what has been done, *i.e.* whether the dealings in question are within the scope and limits of the power.

I have not found in the numerous cases cited, nor in the many others to which I have referred, any instance where the language employed was more comprehensive to clothe the trustees with full control and discretionary power over the property committed to their care.

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It may be that the term "advances" was not the most appropriate expression to use in relation to the dispositions the trustees were empowered to make. But read in connection with the other language of the clause it is manifest that the testatrix did not mean to use the term in any technical sense. She did not intend to restrict the trustees either as to the time or times or occasions when, or as to the property out of which, they might give to the children. She intended that they might take out of either the corpus or income, or both, what they might deem proper for the benefit of the children or any of them. This might be on their marriage or as an advancement in life, that is, in order to better their circumstances, or for any other purpose that might appear to them wise and reasonable.

The directions here given confer almost unlimited power, more particularly when read with what follows, by which the testatrix places the trustees in her own position to deal with the children as they think, under all the circumstances, may be in their true interests. Assuming the powers and discretion thus conferred to be exercised in good faith, it is difficult to place any limit upon their exercise.

That the testatrix contemplated the probability of these wide powers being exercised appears from the next clause of the will where she directs what is to be done, on the death of all of her children, with "the rest, residue and balance then undisposed of." She contemplates a disposition by the trustees of parts of the estate, not mere advances to supplement the income or annuity given by the will.

And while it may be thought that the trustees have availed themselves very largely of the powers of disposition conferred upon them, it does not appear, in the absence of fraud or *mala fides*, that they have made an excessive use of them: *In re Brittlebank*, *Coates v. Brittlebank* (1881), 30 W.R. 99.

The fact that the defendant Frank Bilton has settled the property given to him upon trust and that the trustees of the will are the trustees under his settlements, was strongly insisted upon as evidence of a wrongful intent.

But I agree with what the learned Chancellor has said upon this point, as well as with the manner in which he has disposed



of the argument based upon the execution of a will by the defendant Naomi Bilton.

I think the appeal should be dismissed.

LISTER, J.A., died before the delivery of judgment.

*Appeal dismissed.*

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## [IN THE COURT OF APPEAL.]

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V

THE SAULT ST. MARIE PULP AND PAPER CO.

*Master and Servant—Negligence—Unguarded Machinery—Negligence of Fellow-Servant—Operating Cause—Damages.*

A workman employed by the defendants in order to do his work had to climb a stepladder and step over the unguarded rim of a cogwheel to a plank. In coming from his work a truckman removed the ladder as he was stepping on it, and in recovering himself his leg went through the spokes of the wheel, which was in motion, and he was injured.

The jury found: that the injury was caused by the negligence of the defendants, and not by workman's own negligence or want of proper care: that it was only to a certain extent caused by the negligence of a fellow-servant, for if the wheel had been properly guarded and the ladder properly fastened to the floor the accident would not have happened: that the negligence of the defendants consisted in not guarding the wheel and fastening the ladder: that the wheel was a dangerous part of the mill gearing, and was not as far as practicable securely guarded, and that plaintiff would not have received the injury if it had been so securely guarded:—

*Held*, that the findings of the jury as to negligence were amply supported by the evidence and could not be interfered with.

That the defendants were bound at common law to take all reasonable precautions for the safety of their workmen, and it was for the jury to say what were such reasonable precautions.

That the defendants were also bound by the Factories Act to securely guard as far as practicable all dangerous parts of their machinery.

That the jury having so found, the intervention of the truckman in wrongfully taking away the ladder did not relieve the defendants from the consequences of their negligence, which still remained an operating cause of the injury.

*Mann v. Ward* (1892), 8 Times L.R. 699, not regarded as an authority.

As the damages were excessive a new trial was granted unless the plaintiffs consented to reduce them.

THIS was an appeal from the judgment of FALCONBRIDGE, C.J.K.B., at the trial.

The following statement of facts is taken from the judgment of ARMOUR, C.J.O., in the Court of Appeal:—

The plaintiff Harry Myers was employed by the defendants in running a dryer in their pulp mill and his duties were to keep the pulp off the press rolls, to keep the floor clean, to keep the machine running, and to tie up the pulp.

In order to get to and from the press rolls he had to climb up a stepladder and step from the stepladder up on to the end of a narrow plank which served as a walk to the press rolls.

The stepladder consisted of five steps on one side and two legs at the other, and was set opposite and at right angles to the end of the plank, and was set close to the side of a cog-wheel, part of the rim of which revolved between the top of the stepladder and the end of the plank.

The stepladder was of light material, easily moved and was not fastened in any way.

In stepping from the top of the stepladder to the end of the plank the said plaintiff was obliged to step over and across part of the rim of the cogwheel.

In coming down from the press rolls, holding on to the top of an upright screw (like the hand break on a railway car) with his left hand, he was stepping from the end of the plank to the top of the stepladder with his right foot, but before his foot reached the top of the stepladder a truckman in the employment of the defendants, apparently by way of a practical joke, pulled away the stepladder, and being unable to recover himself and holding on to the screw, his right leg was thrown between the spokes of the cogwheel, which was in motion, was broken, and had to be amputated.

This cogwheel was not guarded in any way, unless, as was contended, the stepladder formed a guard.

The defendants deducted from the said plaintiff's wages during the time he was in their employment fifty cents a month for insurance against accident, and they effected an insurance of their employees on the 10th of August, 1898, with the Dominion of Canada Guarantee and Accident Insurance Company, which insurance expired on the 10th of August, 1899, and they then effected an insurance of their employees with the Ocean Accident and Guarantee Corporation, which insurance expired on the 10th of August, 1900, so that on the 19th of August, 1900, when the plaintiff was injured, the defendants held no insurance of their employees.

About the 1st of September, 1900, the defendant company and other companies entered into an arrangement to take effect from the 10th of August, 1900, for themselves, insuring their employees against accident; and it was shewn that under this arrangement the said plaintiff would be entitled to the sum of

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\$125, which was offered to him upon his releasing the defendants from all claims, which he refused.

The cause was tried by the Chief Justice of the King's Bench, who submitted the following questions to the jury, which they answered as follows:—

1. Q. Was the injury to the plaintiff, Harry Myers, caused by any negligence of the defendants? A. Yes.

2. Q. Or was it caused by his own negligence and want of proper care and caution? A. No.

3. Q. Or was it caused by the negligence or improper conduct of a fellow servant? A. Only to a certain extent, but if this wheel had been properly guarded, and the ladder properly fastened to the floor, the accident would not have happened.

4. Q. If you find that the injury was caused by the negligence of the defendants, wherein did such negligence consist? A. By in no way guarding the gear wheel and not fastening the ladder properly to the floor.

5. Q. Was the machinery at which the plaintiff, Harry Myers, received his injury a dangerous part of mill gearing or machinery, so that it ought to have been as far as practicable securely guarded? A. It was.

6. Q. If so, was it, as far as practicable, securely guarded? A. It was not.

7. Q. If you answer "no" to the last question, and if you also find that the injury to the plaintiff, Harry Myers, was in any way the result of negligence or improper conduct of a fellow servant, would the plaintiff, Harry Myers, have received the particular injury, which he complains of, if the machinery had been, as far as practicable, securely guarded, notwithstanding such negligence or improper conduct of the fellow servant? A. He would not.

8. Q. At what sum do you assess the damages? A. (a) To the plaintiff, Harry Myers, \$4,000; (b) to his father, the plaintiff, John W. Myers, \$500.

9. Q. Are the plaintiffs, or either of them, entitled to receive any sum from the defendants under any contract of insurance or other contract? A. Yes.

10. Q. If so, what amount? A. \$125.



The action was tried at Sault Ste. Marie on the 5th, 6th, 8th and 9th of July, 1901, before FALCONBRIDGE, C.J., and a jury.

*W. H. Hearst*, and *J. McKay*, for the plaintiffs.

*J. E. Irving*, for the defendants.

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August 30. FALCONBRIDGE, C.J.:—I think in view of the very clear and specific answers of the jury, particularly to question seven, that judgment must be entered for the plaintiffs, viz., to the plaintiff, Harry Myers, for \$4,000, to the plaintiff, John W. Myers, for \$500, with costs.

From this judgment the defendants appealed to the Court of Appeal, the plaintiffs cross-appealing as to the \$125, and the appeals were heard on November 22nd, 1901, before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A.

*Riddell*, K.C., and *J. E. Irving*, for the defendants. The evidence before the jury was not sufficient to fix any liability on the defendants. The pulling away of the stepladder by a fellow workman was no act of the defendants: *Howells v. The Landore Siemens Steel Co.* (1874), L.R. 10 Q.B. 62; *McKelvin v. The City of London* (1892), 22 O.R. 70; Wharton on Negligence, 2nd ed., sec. 134. Section 20, sub-sec. 1 (a) of the Factories Act, R.S.O. 1897, ch. 256, does not apply to this case, because the wheel was not "dangerous" within the section. Even if the wheel was "dangerous," it was sufficiently guarded by the ladder itself, and when it was pulled away the guard was removed. The wheel was safe if not interfered with, and the interference or intervention by an outsider, such as the fellow workman here, could not make the master liable. If what happened had been expected, or was likely to happen, perhaps the defendants might be made liable, but no such event could have been anticipated. The fellow workman could have criminally pushed the boy into the wheel, and that could not have made the employer liable. The rule of law is, that even if there be negligence, the intervention of a responsible agent between the original negligence and the casualty relieves the person guilty of such negligence, and the casualty becomes the act of the intervener and he alone is liable. The original

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negligence is indeed the *causa sine quâ non*, but not the *causa causans*—a condition of the casualty rather than a cause. We refer to *Mann v. Ward* (1892), 8 Times L.R. 699; *Beven on Employers' Liability, passim*; *Bishop on Non-Contract Law*, secs. 41, 42; *Wharton on Negligence*, 2nd ed., secs. 133, 134 and 136; *The Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S.C.R. 595; *The Canadian Coloured Cotton Mills Co. v. Kervin* (1899), 29 S.C.R. 478. The damages were excessive: *Fahey v. Jephcott* (1901), 2 O.L.R. 449; *Curran v. Grand Trunk R.W. Co.* (1898), 25 A.R. 407.

*W. M. Douglas*, K.C., for the plaintiffs. There was sufficient evidence and the jury's findings should not be interfered with. The wheel was "dangerous," and could have and should have been guarded. Where there is a breach of a statutory provision, the intervention of a third party will not relieve the employer from liability. The moving of a ladder, which was not in any way fastened, was just what might have been anticipated, and was, in fact, a probable result, and should have been foreseen and provided against: *Groves v. Wimborne*, [1898] 2 Q.B. 402; *Baddelley v. Earl Granville* (1887), 19 Q.B.D. 423; *Blamires v. The Lancashire and Yorkshire R.W. Co.* (1873), L.R. 8 Ex. 283; *Clark v. Chambers* (1878), 3 Q.B.D. 327; *Dixon v. Bell* (1816), 5 M. & S. 198, cited in *Clark v. Chambers*, at p. 330, and cases cited at pp. 331, 332 and 338; *Re The Bernina* (1886), 12 P.D. 59, at pp. 61, 89; *Paterson v. The Mayor, etc., of Blackburn* (1892), 9 Times L.R. 55; *Beven's Law of Negligence*, p. 88; *Webster v. Foley* (1892), 21 S.C.R. 580. The damages were not excessive, as the boy lost his leg and is for ever incapacitated. The plaintiffs should have received the sum of \$125, awarded them by the jury.

*Riddell*, in reply, cited *Willetts v. Watt & Co.*, [1892] 2 Q.B. 92. As to the insurance; there was no contract of these defendants either to keep the infant plaintiff insured or to pay insurance to him.

April 12. ARMOUR, C.J.O.:—The findings of the jury as to negligence were amply supported by the evidence and cannot be interfered with.

The defendants were bound by the common law to take all reasonable precautions for the safety of their workmen; and it was for the jury to say what were such reasonable precautions: *Smith v. Baker*, [1891] A.C. 325; *Webster v. Foley*, 21 S.C.R. 580.

The defendants were also bound by the Factories Act to securely guard, as far as practicable, all dangerous parts of machinery used by them in their factory.

The jury were, I think, warranted in finding, that the providing a stepladder upon which the workman had to go to and from his work, which was easily movable and which the defendants ought reasonably to have anticipated might at any time be removed by any one, whether a right or a wrong doer, was not taking a reasonable precaution for the safety of the workman.

They were also warranted in finding that the part of the cogwheel, where the workman received his injury, was a dangerous part of the machinery, and that it was not, as far as practicable, securely guarded.

It could not well be contended, that the rim of this wheel, over which the workman had to step every time he went to or returned from his work, should not have been securely guarded, and if it had been, the workman, when the stepladder was removed, would not have been obliged to avoid the wheel, and would have been less likely to have met with the injury; and there was no reason why, if the rim had been guarded, the guard should not have been extended to guard that part of the wheel where the workman received his injury.

The jury having found that the injury to the workman was caused by the negligence of the defendants in no way guarding the wheel, and in not properly fastening the ladder to the floor, and this finding being, as I think, supported by the evidence, the next question is, did the intervention of the workman in wrongfully taking away the ladder relieve the defendants from the consequences of their negligence, and I think not, for the defendant's negligence still remained an operating cause of the workman's injury.

According to what is said by Lord Esher and Rigby, L.J., in *Engelhart v. Farrant & Co.*, [1897] 1 Q.B. 240, the question

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whether the negligence of the defendants was an effective cause of the workman's injury was a question for the jury, and if so, they have in effect determined it, by finding, as they did in their answers to the third and seventh questions submitted to them.

And I think that the authorities shew that the intervention of the workman in wrongfully taking away the ladder did not relieve the defendants from the consequences of their negligence.

In *Illidge v. Goodwin* (1831), 5 C. & P. 190, the defendant's cart and horse were left standing in the street without any one to attend to them. A person passing by whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident. But Tindal, C.J., ruled that even if this were believed it would not avail as a defence. "If," he said, "a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done" p. 192.

The authorities bearing on the subject up to that time were all reviewed by Cockburn, C.J., in *Clark v. Chambers* (1878) 3 Q.B.D. 327.

In *The Bernina*, 12 P.D. 58, Lord Esher laid down this proposition: "If no fault can be attributed to the plaintiff, and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer" p. 61.

And Lindley, L.J., laid down the same proposition in this way: "A. without fault of his own is injured by the negligence of . . . B. and C. and unless C. is A.'s agent or servant there will be no difference in the result" (from what it would have been if A. had been injured by the negligence of B. alone) "except that A. will have two persons instead of one liable to him. A. may sue B. and C. in one action, and recover damages against them both; or he may sue them separately and recover the whole damage sustained against the one he sues: *Clark v. Chambers*, 3 Q.B.D. 327, where all the previous



authorities were carefully examined by the late Lord Chief Justice Cockburn."

The case of *Mann v. Ward*, 8 Times L.R. 699, cited as against this view, after what was said of it in *Engelhart v. Farrant & Co.*, cannot as reported be regarded as an authority.

*Paterson v. The Mayor, etc., of Blackburn*, 9 Times L.R. 55, is in favour of this view, as is also the case of *Engelhart v. Farrant & Co.* above referred to.

In the latter case, the defendant employed a man to drive a cart, with instructions not to leave it, and a lad, who had nothing to do with the driving, to go in the cart and deliver parcels to the customers of the defendant. The driver left the cart in which the lad was and went into a house, placing the reins on a hook intended to hold them when the driver was not using them; whilst the driver was away, the lad took the reins and proceeded to drive the cart a little way along the street for the purpose of turning it, and, in so doing, came into collision with the plaintiff's carriage. The Court held that the driver's negligence was the effective cause of the mischief and that the defendant was liable.

As I have said above, Lord Esher and Rigby, L.J., holding that if there had been a jury, it would have been a question for them, whether the negligence of the defendant's driver was the effective cause of the mischief.

The finding of the jury in the case in hand was, as I have said, a finding, in effect, that the negligence of the defendants was the effective cause of the injury to the workman, and the authorities I have referred to lead me to the same conclusion.

I think, however, that the damages were excessive, and that there should be a new trial with costs of the appeal to the defendants, and the other costs to be in the cause to the successful party; but if the plaintiffs elect to reduce the damages assessed to the infant plaintiff to \$2,000 and to the other plaintiff to \$100, the appeal will be dismissed with costs.

OSLER, J.A.:—I agree in the result, viz., that there was evidence of negligence on which the jury might properly find, as they have done, but that the defendants are entitled to a new trial unless a reduction of the damages is assented to.

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As regards the plaintiffs' cross-appeal to increase the verdict by the amount of his claim for insurance: it was very faintly pressed by Mr. Douglas, and I have not been able to discover any ground on which it is maintainable.

The defendants' offer to pay \$125 on account of it appears to have been purely voluntary, and upon the terms of receiving a release of all demands, and there was, at the time of the accident, neither an existing policy nor a voluntary insurance operative, under which the plaintiff was entitled to receive anything.

MACLENNAN, J.A., concurred in the judgment of ARMOUR, C.J.O.

MOSS, J.A., concurred.

LISTER, J.A., died while the appeal was under consideration.

G. A. B.

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## [IN THE COURT OF APPEAL.]

## RE VILLAGE OF MARKHAM ET AL. AND TOWN OF AURORA.

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*Municipal Corporations—By-law—Bonus—Promotion of Manufactures—Removal of Industry “already Established”—Municipal Amendment Act, 1900, sec. 9—Motion to Quash Registered By-law—Delay.*

By sec. 9 of the Municipal Amendment Act, 1900, a new sub-section, 12, is added to sec. 591 of the Municipal Act, R.S.O. 1897, ch. 223, which new sub-section provides that councils of municipalities may pass by-laws for granting aid by way of bonus for the promotion of manufactures within the limits of the municipality, but (e) “no by-law shall be passed by a municipality for granting a bonus to secure the removal of an industry already established elsewhere in the Province:”—

*Held*, that by-laws of a town granting aid to persons who were carrying on a manufacturing business in a village, and who, as the by-law recited, were about to remove their plant and machinery and carry on the same business in the town, were illegal under cl. (e), notwithstanding that these persons had determined, before negotiating with the town, to remove their business from the village at all events, and to such other place as should offer the largest inducement.

The by-laws were quashed, upon an application made within three months after they were registered, and nearly three months after they were passed, notwithstanding that the industry had been in the meantime established in the town and the money paid over to the manufacturers.

Decision of Lount, J., reversed.

AN application by the corporation of the village of Markham and John Flintoff, a ratepayer of the town of Aurora, for a summary order quashing by-law No. 192 of the corporation of the town of Aurora, a by-law “to authorize the issue of debentures of the town of Aurora to the amount of \$10,000 bearing interest at the rate of four per cent. per annum for the purpose of granting a bonus of \$10,000 to Messieurs Underhill and Sisman (who are now carrying on the business of manufacturing boots and shoes in the village of Markham, in the county of York, and who are about to remove their plant and machinery and carry on the said manufacturing business in the town of Aurora), to enable them to purchase land, erect and equip a factory and other necessary buildings, for the purpose of carrying on the business of manufacturing boots and shoes in the town of Aurora,” and quashing by-law No. 193 of the same corporation, a by-law “to authorize the town of Aurora to exempt Messieurs Underhill and Sisman . . . from all municipal taxation (excepting school taxes) for a period of ten years from the time hereinafter fixed for this by-law to come

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into effect, on all lands, buildings, and plant, owned, used, and occupied by them in their business of manufacturing boots and shoes in the said town of Aurora, and to provide them all water actually required by them in their said business, free of cost, for a term of ten years." The by-laws, after being submitted to the electors, were finally passed by the council on the 4th March, 1901. The motion to quash was launched on the 23rd May, 1901.

It was heard by LOUNT, J., in the Weekly Court, on the 4th June, 1901.

*C. Robinson*, K.C., and *W. E. Raney*, for the applicants.

*A. B. Aylesworth*, K.C., and *T. H. Lennox*, for the respondents.

July 4. LOUNT, J. :—The applicants rely on the second and fourth grounds taken in their notice of motion to quash by-laws 192 and 193 of the respondents. The other grounds were abandoned.

The second ground is that : "The said by-laws were passed by the corporation of the town of Aurora for granting bonuses to secure the removal of an industry (to wit, the boot and shoe manufactory of Messrs. Underhill and Sisman) already established elsewhere in the Province (to wit, in the village of Markham), contrary to the provisions of sec. 9 of the Municipal Act, 1900."

By sec. 9 of 63 Vict. ch. 33, sec. 591 of the Municipal Act, R.S.O. 1897, ch. 223, is amended by providing that councils of counties, townships, cities, towns, and incorporated villages may pass by-laws "for granting aid by way of bonus for the promotion of manufactures within the limits of the municipality to such person or body corporate and in respect of such branch of industry as the municipal council may determine upon ; and to pay any sum of money granted by way of gift or loan either in one sum or in annual or other periodical payments with or without interest and subject to such terms, conditions, and restrictions as the said municipality may deem expedient." And by sub-sec (e) of sec. 9 it is provided that "no by-law shall be passed by a municipality for granting a bonus to secure the removal of an industry already established elsewhere in the Province."



The contention is, that the by-laws in question are invalid and should be quashed because they are in violation of the restriction in sub-sec. (e), and were passed for the purpose of securing the removal of the industry of Underhill and Sisman from the village of Markham, where it has been established for a number of years, to the town of Aurora.

The disposition of this question is one of fact, to be ascertained and determined from the evidence.

I have carefully read and considered the evidence, and from the best conclusion I have been able to arrive at, I am of the opinion that on this ground the application must fail.

I find that before the last January municipal elections Messrs. Underhill and Sisman, and especially Underhill, had become dissatisfied and discontented with the manner in which his firm had been treated and dealt with by the council and by some of the ratepayers of the village, and to test this feeling Underhill, who had been reeve of the village two years before, put himself in nomination and ran for that office in January last; he was defeated by a large majority; this he accepted as evidence of the hostile feeling on the part of the ratepayers to his firm and to the business of his firm, and on the evening of the election, after the closing of the poll, he stated to Mr. Wilson, his opponent, that he was very much disappointed—that he ran as a candidate to see what the people thought of his factory—and that his factory would not be there (in that village) six months from that day. I think his mind was then determinedly made up to remove his factory away, and he maintained his attitude firmly throughout after that—except on the one occasion when two citizens were deputed to wait upon him, which they did, to ascertain if his firm could be induced to remain. At this interview the question of their remaining was discussed, and it was mentioned that a bonus of \$5,000 might be granted by the municipality to induce them to remain. Nothing, however, came of this, as the council refused to consider the proposition. I do not think, having regard to all the evidence, that Underhill ever seriously considered or entertained the question of a \$5,000 bonus from the village, or that his firm ever changed their determination to remove their factory away from the village. The firm had put themselves into communi-

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cation with other municipalities to learn what terms or conditions might be offered to obtain the establishment of their industry elsewhere; public notice of their intention to remove had appeared in the *World* newspaper in Toronto; and it was after it had become publicly and generally known that the firm intended to remove, that the respondents—having learned of this intention—at once put themselves in communication with the firm and then arranged and agreed to grant the bonuses in question. It is beyond question that the advantages as a place of business for carrying on of their factory are very much in favour of Aurora as against Markham, and that the work can be done more favourably and profitably at the former place.

In my opinion—and I so find—the respondents acted in good faith, well believing and having good reason to believe, at the time they first communicated with the firm, that they had then and before that time positively and finally decided to remove their factory from the village of Markham, and they remained in that belief thereafter, and nothing occurred to cause them to change such belief. This being the case, they were perfectly within their legal rights to try and secure the establishment of this factory in their own municipality by passing the by-laws in question; and I find that there was no violation of sub-sec. (e) by the respondents.

The fourth ground taken is, “that the said by-laws do not settle specific sums to be annually raised for principal and interest respectively, as required by sub-sec. 5 of sec. 384 of the Municipal Act.” These by-laws come under sec. 386 of the Municipal Act, which provides for making the debts payable in annual instalments, adopting the provisions of sec. 384, 385, and 386, and are in substantial compliance with them. Section 399, sub-sec. 6, of the Act provides that “nothing in this section contained shall be taken to make valid a by-law or the debentures issued thereunder where it appears on the face of such by-law that the provisions of sub-secs. 4, 5, 8, and 9 of sec. 384, or the provisions of sec. 386 of the Act, have not been substantially complied with.” I think there has been the substantial compliance required: see *Re Farlinger and Village of Village of Morrisburg* (1889), 16 O.R. 722, at p. 724; *Re Caldwell and Town of Galt* (1899), 30 O.R. 378, at p. 382 *et seq.*

Motion dismissed with costs.

The corporation of the village of Markham appealed from the order of LOUNT, J., to the Court of Appeal, and their appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A., on the 14th January, 1902.

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*W. E. Raney* and *A. Mills*, for the appellants. The evidence does not justify a finding of good faith on the part of the town of Aurora. It rather suggests that the council of Aurora, knowing the law, deliberately sought means to evade it. But it makes no difference what the belief of the council of Aurora was. The statutory prohibition extends to the removal of every "industry already established elsewhere in the Province." The industry of Underhill and Sisman did not cease to be established in Markham even upon the signing of the agreement between the firm and Aurora. An industry is a physical fact. It must always be established somewhere. A mere resolution of its owner to change its location does not disestablish it. But the evidence establishes that Underhill and Sisman did not finally determine to move their factory from Markham until they accepted the offer of the bonus from Aurora. Legislation favouring the bonusing of manufacturing industries is in general contrary to the public interest: *Loan Association v. Topeka* (1874), 20 Wall. (U.S.) 655: and should receive a strict construction. By-law 192 does not comply with the requirements of sec. 384, sub-sec. 5, of the Municipal Act, R.S.O. 1897, ch. 223, in that it does not settle a certain specific sum to be raised annually for the payment of interest, and also a certain specific sum to be raised annually for the payment of the debt: *Re Peck and Township of Ameliasburg* (1889), 17 O.R. 54; *Re Hay and Township of Listowel* (1897), 28 O.R. 332; *Re Caldwell and Town of Galt*, 30 O.R. 378. By-law No. 192 does not comply with sec. 384, sub-secs. 9 and 10, of the statute, in that it does not require an annual amount to be raised and does not recite the amount of the debt intended to be created.

*A. B. Aylesworth*, K.C., and *T. H. Lennox*, for the corporation of Aurora, the respondents. The finding of fact is in our favour. A by-law is not illegal because it is passed to bonus an industry that moves from one place to another. The illegality consists in the by-law being passed for the express purpose of securing the removal of the industry from the place where it is

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already established, and the onus is on the one attacking the by-law to prove that it was passed for this express purpose. This by-law could not have been passed with the express purpose of accomplishing something which, to the knowledge of the respondents, had already been accomplished. The contention that by-law 192 does not settle specific sums to be raised annually for principal and interest is disposed of by *Re Farlinger and Village of Morrisburg*, 16 O.R. 722, 724; and see *Re Caldwell and Town of Galt*, 30 O.R. at pp. 385 *et seq.* The appellants by their laches and delay in moving against the by-laws have disentitled themselves to any relief: *Hill v. Municipality of Tecumseth* (1856), 6 C.P. 297; *In re Standley and Municipality of Vespra* (1859), 17 U.C.R. 69; *In re Taber and Township of Scarborough* (1861), 20 U.C.R. 549; *In re Grant and City of Toronto* (1862), 12 C.P. 347; *Scarlett v. Corporation of York* (1864), 14 C.P. 161; *Bann v. Brockville* (1890), 19 O.R. 409. This appeal now affects the question of costs only. The industry has been removed and the money paid over. Nothing can result to the appellants from a judgment in their favour except an altered disposition of costs, and an appeal for costs will not be encouraged: *Moir v. Village of Huntingdon* (1891), 19 S.C.R. 363; *Wansley v. Smallwood* (1885), 11 A.R. 439; *Dwyer v. Town of Port Arthur* (1892), 19 A.R. 555; *In re Holden and Town of Belleville* (1876), 39 U.C.R. 88; *Daniels v. Township of Burford* (1853), 10 U.C.R. 478; *Terry v. Township of Haldimand* (1858), 15 U.C.R. 380.

April 10. ARMOUR, C.J.O.:—This is an appeal from the judgment of Lount, J., dismissing the motion made by the corporation of the village of Markham to quash by-laws numbers 192 and 193 of the corporation of the town of Aurora.

By-law 192 was "to authorize the issue of debentures of the town of Aurora, to the amount of \$10,000, bearing interest at the rate of four per cent. per annum, for the purpose of granting a bonus of \$10,000 to Messieurs Underhill and Sisman (who are now carrying on the business of manufacturing boots and shoes in the village of Markham, in the county of York, and who are about to remove their plant and machinery and carry on the said manufacturing business in the town of



Aurora), to enable them to purchase land, erect and equip a factory and other necessary buildings, for the purpose of carrying on the business of manufacturing boots and shoes in the town of Aurora," which by-law contained a recital that the said manufacturing firm of Underhill and Sisman had decided to remove their plant and works from the village of Markham under any circumstances, and, having expressed a desire to locate their said business in the town of Aurora, had asked the corporation of the said town for a bonus of \$10,000 to enable them to purchase land, erect and equip a factory and all other necessary buildings required, for the purpose of carrying on the business of manufacturing boots and shoes in said town.

And by-law 193 was "to authorize the town of Aurora to exempt Messieurs Underhill and Sisman (who are now carrying on the business of manufacturing boots and shoes in the village of Markham, in the county of York, and who are about to remove their plant and machinery and carry on their said manufacturing business in the town of Aurora) from all municipal taxation (excepting school taxes), for a period of ten years from the time hereinafter fixed for this by-law to come into effect, on all lands, buildings, and plant, owned, used, and occupied by them in their business of manufacturing boots and shoes in the said town of Aurora, and to provide them all water actually required by them in their said business, free of cost, for a term of ten years," which said last-mentioned by-law contained a recital that the said manufacturing firm of Underhill and Sisman had decided to remove their plant and works from the village of Markham under any circumstances, and, having expressed a desire to locate their said business in the said town of Aurora, had asked the said corporation of the said town of Aurora to exempt them from all municipal taxation, except school taxes, for the said period of ten years, and also to provide them water free of expense, for a period of ten years, to enable them to carry on their business of manufacturing boots and shoes as aforesaid.

These by-laws were passed under the provisions of the law contained in sec. 9 of the Municipal Amendment Act, 1900, 63 Vict. ch. 33 (O.), by which it is provided that the councils of counties, townships, cities, towns, and incorporated villages, may

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pass by-laws "for granting aid by way of bonus for the promotion of manufactures within the limits of the municipality to such person or body corporate and in respect of such branch of industry as the municipal council may determine upon," but by which it is also provided that (e) "No by-law shall be passed by a municipality for granting a bonus to secure the removal of an industry already established elsewhere in the Province."

At the time of the passing of these by-laws the industry of Messieurs Underhill and Sisman was "already established" in the village of Markham, and these by-laws were attacked as having been passed to secure the removal of such industry to the town of Aurora, in contravention of the said prohibition.

The learned Judge whose judgment is appealed from thus stated the reason of his judgment: "In my opinion—and I so find—the respondents acted in good faith, well believing and having good reason to believe, at the time they first communicated with the firm, that they had then and before that time positively and finally decided to remove their factory from the village of Markham, and they remained in that belief thereafter, and nothing occurred to cause them to change their belief. This being the case, they were perfectly within their legal rights to try and secure the establishment of this factory in their own municipality by passing the by-laws in question, and I find that there was no violation of sub-sec. (e) by the respondents."

I am unable to agree with the learned Judge that, because Messieurs Underhill and Sisman had "positively and finally decided to remove their factory from the village of Markham," the respondents "were perfectly within their legal rights to try and secure the establishment of this factory in their own municipality by passing the by-law in question."

And I do not think that the determination of Messieurs Underhill and Sisman to remove their factory from the village of Markham at all relieved the respondents from the prohibition against passing by-laws to secure the removal by Messieurs Underhill and Sisman of such industry to the town of Aurora; the prohibition plainly being against a municipality passing a by-law granting a bonus to secure the removal to it of an industry already established elsewhere in the Province.

It is quite clear that when Messieurs Underhill and Sisman determined to remove their factory from the village of Markham, they had not determined to what municipality they would remove it, but were waiting to see which municipality would offer the greatest inducements to them to remove their industry to it, and that they only determined to remove it to the town of Aurora by reason of the passing of the by-laws in question.

And it is equally clear, and the learned Judge in effect so found, that the respondents passed these by-laws to secure the removal to their municipality of the said industry, in direct contravention of the prohibition of the statute.

In my opinion, therefore, the judgment appealed from should be reversed, and the by-laws quashed with costs here and below.

OSLER, J.A.:—I am of opinion that these by-laws are illegal and ought to be quashed, on the ground that they are plainly in contravention of the Municipal Amendment Act, 1900, 63 Vict. ch. 33, sec. 9, which adds a sub-section, 12, to sec. 591 of the Municipal Act, R.S.O. 1897, ch. 223. The new section provides that councils of all municipalities may pass by-laws for granting aid by way of bonus, in the shape of a gift of money or exemption from taxes, or both, for the promotion of manufactures within the limits of the municipality, to such person and in respect of such branch of industry as the council may determine upon, the assent of the electors of the municipality having been first obtained in the usual manner. Item (e) of sub-sec. 12, however, especially enacts that “no by-law shall be passed by a municipality for granting a bonus to secure the removal of an industry already established elsewhere in the Province.”

At the time the by-laws in question were passed, a boot and shoe factory, the property of a firm of Underhill and Sisman, had been for some time established in the village of Markham, and it was then being actively carried on there. It was in the mind of its owners to remove it from that village, apparently because they thought they were not sufficiently appreciated there, and they began to negotiate with divers other municipalities with the object of removing it to, and establishing it in, that one which should offer the largest inducement in the way

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of cash bonus and exemption from taxes. The town of Aurora was the highest bidder, and its offer was accepted by the proprietors of the factory. The by-laws were thereupon passed which are now attacked.

It was strongly contended by the respondents that, as Underhill and Sisman had determined to remove from Markham in any case, the by-laws could not be said to have been passed to secure the removal of the industry already established there. I do not appreciate the force of that argument. The fact remained that the industry was established there. Its removal was a matter in the control of its owners, who might have changed their minds at any time, and would not be less likely to do so if they found that other municipalities were not willing to give them the advantages they were seeking. The only object of such by-laws as these is to secure the removal of the industry—not into the air or generally away from the place where it is being carried on, for the donators do not care a bit about that—but from thence into the municipality which passes them.

Therefore, what the Legislature has forbidden is the granting of a bonus by one municipality to secure the removal *into* its own borders of an industry already established elsewhere, for no municipality ever had authority to grant a bonus in aid of an industry to be established outside its own limits, and the Legislature never meant to enact anything so absurd as to forbid them to do so. It was a matter of no moment to Aurora where the factory went, if it did not come there, and the council secured its removal from Markham to Aurora by passing the by-laws in question, no matter how deeply its proprietors had sworn, bonus or no bonus, to shake the dust of Markham from their feet.

It was also urged by the respondents that there had been such delay on the part of the appellants in moving to quash the by-laws that the Court ought not to interfere, as Underhill and Sisman had changed their position, and the town had paid over the money.

The by-laws were passed on the 4th March, 1901, and were registered, as required by sec. 396 of the Municipal Act, on the 27th March, and within three months thereafter, that is to say,



on the 23rd day of May, 1901, the present proceedings were taken. Whether notice of passing the by-laws and of the time limited for moving against them, was published after their registration, pursuant to sec. 397, we are not informed. Probably not, as that section appears to apply only to by-laws which have not been submitted, as these were, to the ratepayers. Section 399 applies, however, to all by-laws which have been registered under sec. 396, and enacts that by-laws so registered shall be valid and binding, unless an action or application to quash or set aside the same is launched within the time prescribed, viz., three months after registration. Registered by-laws are, therefore, outside of the general section 379, which provides that no application to quash a by-law shall be entertained unless made within one year from its passing. Where the delay has been great and unexplained the Courts have, no doubt, in their discretion, declined to quash a by-law valid on its face even when the applicant came within the year. But such cases furnish no rule where the Legislature has expressly provided that, by taking certain proceedings such as promulgation or registration, which bring notice of the by-law before the ratepayers, the time for attacking it shall be still further limited. It is to be assumed that the Legislature has fixed that as being a reasonable time for taking proceedings against the by-law under these circumstances, and, until it has elapsed, persons who have the right to object to it cannot be said to be *in morâ*, nor can those who may be interested in maintaining it put them in the wrong by acting under it, as the respondents say they have done, while it is, as it were, in suspense. It must be a remarkable case in which, when attacked within the three months' limit, the Court will decline to set aside a by-law absolutely *ultra vires*, as these are, of the corporation: *Wiltshire v. Township of Surrey* (1891), 2 Brit. Col. Reps. 79.

I think we should allow the appeal.

MACLENNAN and MOSS, JJ.A., concurred.

LISTER, J.A., died before judgment was given, but after expressing to his colleagues his intention to agree in allowing the appeal.

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## [IN THE COURT OF APPEAL.]

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IN RE TORONTO ELECTRIC LIGHT COMPANY ASSESSMENT.

April 12.

[AND OTHER ASSESSMENTS.]

*Assessment and Taxes—Valuation of Property—Electric Companies—Rails, Poles, and Wires—Wards—Franchise—Going Concern—Integral Part of Whole—1 Edw. VII. ch. 29 (O.)*

The Act 1 Edw. VII. ch. 29, sec. 2 (O.), has made no difference in the mode of valuing for assessment purposes the rails, poles, wires, and other plant of electric companies erected or placed upon the highways of municipalities, which was held to be proper by the decision in *In re Bell Telephone Company Assessment* (1898), 25 A.R. 351; MACLENNAN, J.A., dissenting.

APPEALS by the corporations of the cities of Toronto and Ottawa from the decisions of boards of county court Judges allowing the appeals of the Bell Telephone Company of Canada, the Toronto Electric Light Company, the Toronto Railway Company, the Toronto Incandescent Light Company, and the Ottawa Electric Company, in regard to the respective assessments of their rails, poles, wires, and other plant, erected or placed upon highways in the cities. The matters in dispute and the contentions concerning them are fully stated in the judgments.

The appeals were heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 16th and 17th January, 1902.

*A. B. Aylesworth*, K.C., and *J. S. Fullerton*, K.C., for the appellants the corporation of the city of Toronto.

*Taylor McVeity*, for the appellants the corporation of the city of Ottawa.

*G. Lynch-Staunton*, K.C., and *E. H. Ambrose*, for the respondents the Bell Telephone Company of Canada.

*H. O'Brien*, K.C., for the respondents the Toronto Electric Light Company and the Toronto Incandescent Light Company.

*J. Bicknell* and *J. W. Bain*, for the respondents the Toronto Railway Company.

*H. M. Mowat*, K.C., for the respondents the Ottawa Electric Company.

April 12. ARMOUR, C.J.O.:—The contention of the cities of Toronto and Ottawa in these appeals was that the Act 1 Edw. VII. ch. 29, "An Act to amend the Assessment Act," authorized the assessment of the real property of the respondents at a higher value than was authorized by the law as it stood at the time this Act was passed.

The provision of this Act which is relied on as giving this authority is: "Real property belonging to or in the possession of any person or incorporated company, and extending over more than one ward in any city or town, or situate in any township, may be assessed together in any one of such wards at the option of the assessor, or the assessment of the property may be apportioned amongst two or more of such wards in such manner as he may deem convenient, and in either case the property shall be valued as a whole or as an integral part of the whole."

The law as it stood at the time of the passing of this amendment provided that "land shall be assessed in the municipality in which the same lies, and in the case of cities and towns, in the ward in which the property lies; (and this shall include the land of incorporated companies.)"

The effect of this amendment is to authorize the assessor, in the case of real property belonging to or in the possession of any person or incorporated company, extending over more than one ward in any city or town, instead of assessing in each ward the part of it lying in such ward, to assess the whole of it together in any one ward in which a part of it lies, or to apportion the assessment of the whole of it amongst two or more wards over which it extends, in such manner as he may deem convenient, and in either case the property shall be valued as a whole or as an integral part of the whole, that is, if he assesses the whole of it together in any one ward he shall value it as a whole, and if he apportion the assessment of the whole of it amongst two or more wards, he shall value the part apportioned to each ward as an integral or component part of the whole.

But in the case of such property the assessor is not bound to adopt either of the modes of assessment pointed out in this

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provision, but may assess such property in the wards in which it lies.

The result, therefore, of giving effect to the contention of the appellants would be, that, if the assessor chose to assess such property in the wards in which it lay, it would be valued at one amount, and if he chose to adopt either of the modes of assessment of such property pointed out in this provision, it would be valued at a different amount, and it would be in the power of the assessor to increase or diminish the value of such property by the manner of assessing it that he might choose to adopt, and it is manifest that such a result could not have been intended by the Legislature.

Reliance for the contention of the appellants was mainly rested upon these words in this provision, "and in either case the property shall be valued as a whole," that is, so far as it lies within the municipality, "or as an integral part of the whole."

But there is nothing in these words altering the standard of value prescribed by the 28th section of the Assessment Act; R.S.O. 1897, ch. 224, and, whatever mode of assessing such property the assessor may adopt, he must value it according to the standard so prescribed, and it can make no difference in his valuation, it being governed by that standard, whether he values such property together as a whole or values the whole of it by valuing each of all its integral or component parts, for in either case the total value arrived at will be the same.

The obstacles in the way of a higher valuation of the real property of an incorporated company as the law now stands are, firstly, that under the present law the franchise is not assessable, and the valuation of it must therefore be irrespective of the franchise, and secondly, the standard of value prescribed by sec. 28 of the Assessment Act, which provides that "real and personal property shall be estimated at their actual cash value as they would be appraised in payment of a just debt from a solvent debtor."

In my opinion, the appeals should be dismissed with costs.

OSLER, J.A.:—I am of opinion that these appeals should be dismissed. The single question is whether the Act, 1 Edw. VII.



ch. 29, sec. 2, has altered the law as laid down by this Court in the cases *In re Bell Telephone Co. and City of Hamilton* (1898), 25 A.R. 351, and *In re London Street Railway Company Assessment* (1900), 27 A.R. 83, so as to enlarge or extend the principle on which the property of the respondents should be assessed, or the manner of assessing it. I think the new clause does no more than enable the assessor to assess it all together in one ward, or to apportion the assessment among two or more of the wards, as he may deem it convenient. It merely removes one of the difficulties which we have pointed out in the above and other cases, but does not extend the principle on which the value of such property, apart from the franchise of the company or its use to a going concern, is to be ascertained by the application of the rule provided by sec. 28 of the Assessment Act for ascertaining its value. It is now to be valued as if it were all in one ward, that is to say, as a whole or as an integral part of the whole, but still without reference to its connection with a franchise or its use as the property of a going concern. The learned Chairman of the board of county Judges (McDougall, Co.J.) has given what is, to my mind, a very full and satisfactory exposition\* of the new section, to which I cannot add anything except to say that the decisions by which we are bound require much more comprehensive legislation to remove their effect than anything which is found in that clause. Such legislation, providing for the rights of the public on the one hand and of corporate bodies on the other, may, no doubt, be looked for during the present session of the Legislature.†

MACLENNAN, J.A.:—There are two appeals, which were argued together. One is by the city of Toronto from a decision of County Judges McDougall, McGibbon, and McCrimmon, on a question of the assessment of the Bell Telephone Company, the Toronto Electric Company, the Toronto Railway Company, and the Incandescent Light Company. The other is by the city of Ottawa from a decision of County Judges MacTavish, Senkler, and O'Reilly, on the assessment of the Bell Telephone Company and the Ottawa

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\* See 37 C.L.J. 851.

† See The Assessment Amendment Act, 1902, 2 Edw. VII. ch. 31, sec. 1 (O.)

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Electric Company. The question in both appeals is the same, and is whether the learned Judges were right in deciding that the Act of the Legislature 1 Edw. VII. ch. 29, sec. 2, made no difference in the mode of valuing the rails, poles, wires, and other plant belonging to the respondent companies, erected or placed upon the highways, which was held to be proper by the decision of this Court in the case of *In re Bell Telephone Co. and City of Hamilton*, 25 A.R. 351.

After a very careful consideration of the judgment, and of the arguments by which it was supported before us, I have come to the conclusion that the judgment is wrong.

Section 7 of the Assessment Act (R.S.O. 1897, ch. 224) declares that all property in the Province shall be liable to taxation, subject to certain exemptions. The property in question is not within any of the specified exemptions, and therefore it is upon the same footing as all other taxable property, and ought to bear its just proportion. The only just proportion which can be applied is a proportion of value, and accordingly sec. 28 declares that, with the exception of mineral lands, real property, which that in question is admitted to be, shall be estimated at its actual cash value. If the enactment had stopped there, no difficulty could arise. The actual cash value of the property in question would obviously be what the respondents, requiring it for their business, would have to pay for the materials and labour, in order to produce it, with allowance for wear and tear. The Act, however, goes on to say how the cash value shall be ascertained, and says it shall be estimated as it would be appraised in payment of a just debt from a solvent debtor. In *Consumers' Gas Co. of Toronto v. City of Toronto* (1897), 27 S.C.R. 453, it was held obligatory to assess the real property in the ward in which it lay; and in the case in 25 A.R. the Court decided that in making his valuation the assessor in each ward must confine his attention to so much of the property as lay in his ward, and could not regard its connection, or use, with the part of it which lay in other wards, and that, in applying the mode of appraisal prescribed in sec. 28, the only actual cash value which could be assigned to it was its value on a sale, as chattels to be removed. The statute in effect required it to be valued as if cut up into

several parts, and each part by itself. We are bound by that decision and those which followed it, and the question is, whether the recent Act has not removed the difficulties in the way of a just valuation of such property.

The injunction to assess all property at its actual cash value still remains. So does the mode of appraisal, as if in payment of a just debt from a solvent debtor. But the obligation to assess in several wards is swept away, and it may be assessed all together in any one ward, or it may be apportioned amongst two or more wards, and in either case it should be valued as a whole, or as an integral part of a whole.

The whole section is as follows:—"18a. Real property belonging to or in the possession of any person or incorporated company, and extending over more than one ward in any city or town, or situate in any township, may be assessed together, in any one of such wards at the option of the assessor, or the assessment of the property may be apportioned amongst two or more of such wards, in such manner as he may deem convenient, and in either case the property shall be valued as a whole or as an integral part of the whole."

Each of the respondent companies owns, and is assessed for, freehold land in the ordinary sense, as well as for their rails, poles, wires, etc., upon the public streets, and the two kinds of real estate are connected, both in construction and in use. These two kinds of property taken together answer the description in the sub-section, "real property belonging to . . . any . . . incorporated company, and extending over more than one ward in any city;" and what the section says of it is, that it may be assessed together in any one of such wards. That is what has been done here. The freehold land, with the buildings thereon, and the rails, poles, wires, etc., have all been assessed together in one ward. The provision that the assessment may be apportioned amongst two or more wards has no application here, because that was not done. The final provision of the enactment is that in either case, that is, whether the property is assessed in one ward, or is apportioned amongst two or more, the property, that is, the real property of the company extending over more than one ward, shall be valued as a whole, or as an integral part of the whole.

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Therefore, when the assessor is appraising it as it would be between a solvent debtor and a creditor, he is to value or appraise it as a whole, or if in parts, to appraise each part as an integral part of the whole. In the present case it has been valued as a whole, that is, as if the company, being solvent, were conveying the whole to a creditor in payment of a just debt. It is true the values have been ascertained separately, or in detail, that is, first, the freehold land by itself apart from the buildings and machinery thereon, next the buildings and machinery thereon, and thirdly, the rails, poles, wires, etc., on and over the public streets. The usual, indeed I think almost invariable, method of assessing land with buildings thereon has been, first, to ascertain the value of the land, and then the value of the buildings, having due regard to their fitness and suitableness to the location, and to make the sum of such values the value of the whole, the buildings being in law and in fact part of the land taken as a whole. In the recent case of *Kirkpatrick v. Cornwall Electric Street R.W. Co.* (1901), 2 O.L.R. 113, it was held by this Court that the rolling stock, poles, wires, etc., of an electric railway formed an essential part of the corpus of what must be regarded as an entire machine, and were therefore fixtures, and, whether erected or laid on or in the lands of the company or the streets of the municipality, formed part of the land of the company. It follows, therefore, that, in valuing the land of the company extending over several wards as a whole, the value of the rails, poles, wires, etc., must be included as a part of the whole. The value would then be that at which the company, being solvent, would be willing to part with the whole of their real property within the city in payment of a just debt.

But, even if it become necessary to value a part of the company's real property separately, as in the case of that part which may be in a township outside of a city or town, where perhaps it has no land other than the rails, poles, wires, etc., on the public highways, I think the result must be the same. It must be the full value of these fixtures to the company, because they must be valued as an integral part of the whole. According to the Standard Dictionary an integral part is defined as a part constituting an essential part of a whole, as a



part necessary to its completeness. In Murray's New Dictionary it is said that integral parts are parts belonging to or making up an integral whole; constituent or component; specifically necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage. Therefore, when the Legislature has said that a part is to be valued as an integral part of the whole, I think it plainly means that it is not to be valued without reference to the whole of which it is a part, but as an essential part of the whole, as something without which the whole would be incomplete. It is to be valued, in short, at what it is worth to the debtor, being solvent, as a part of the whole, so that he, being solvent, would be willing to let it go at that value in payment of a debt. It is obvious that in such a case the owner, if solvent, would never allow it to go in payment of a debt, for less than what it was worth to him, as a part of the whole property.

That, I think, is the plain meaning of the new sub-section, and, if so, it is applicable for the just valuation not only of those parts of such property which are situate within the cities where the strictly freehold land and buildings of the respondent companies are situate, but also to those parts which are upon the highways, etc., in the rural municipalities.

I am of opinion that the appeal should be allowed.

Moss, J.A. :—The sole question in these appeals is as to the meaning and effect of the first of the amendments to sec. 18 of the Assessment Act enacted by the Act 1 Edw. VII. ch. 29 (O.) The board of county Judges held that it effected no alteration in the mode of arriving at the value for assessment purposes of the property assessed, but merely enabled municipalities to adopt a different method of making their assessments. One cannot read the enactments in question without being impressed with the idea that the Legislature intended to effect a more substantial change in the existing law, and if the language employed, read fairly in connection with the context, can be held to express that intention, the duty of the Court is to give effect to it.

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As the law stood at the date of the passing of the amendment the following points had been adjudged with respect to property of the quality of, and held and operated in the same manner as, that in question in these appeals, viz. :—

1. It was real estate for the purposes of assessment.
2. As such it was to be valued according to the rule prescribed by sec. 28 of the Assessment Act.
3. Where such property extended into more than one ward of a municipality, the part in each ward should be assessed separately.
4. In ascertaining the "real estate" or thing to be valued, and in estimating the actual cash value for assessment purposes, the assessor could not take into account the existence of franchises or treat the property as having an enhanced value by reason of its forming part of an existing system in actual operation.

Municipalities complained that, in this state of the law, property of the nature and kind in question could not be assessed at values at all commensurate with its real value to the proprietors, and did not therefore bear its due proportion of the municipal taxes.

It is contended that a remedy has been provided by the enactment of the amendment to sec. 18 of the Assessment Act. Section 18, so far as material to present purposes, directs that land (as interpreted by sec. 2 (9)) shall be assessed in the municipality in which the same lies, and in the case of cities and towns in the ward in which the property lies, thus defining the area within which the assessor is to act in assessing land. But this section does not assume to give any direction to the assessor with regard to the values he is to place upon land. That is given by sec. 28. The amending provisions do not refer in terms to sec. 28. Do they by implication or otherwise alter the rule under which the assessor is to act in placing for assessment purposes a value upon land?

Section 18*a* relaxes the limitations placed upon the area by sec. 18. Wards may be disregarded in whole or in part, and real property of the nature and kind therein specified is to be valued as a whole or as an integral part of the whole. Here is a direction to the assessor enabling him to value the real

property answering the description without reference to ward limits and to treat as a complete property that which in fact may be only part of an entire property. But in estimating the value what rule is he to apply? No new rule for ascertaining the actual cash value of real property is substituted for that provided by sec. 28. Can it be said that as regards real property answering the description contained in sec. 18a the provisions of sec. 28 are not to apply? To do so would be to hold that the words "real property" in sec. 28 are no longer to be read as applying to lands generally as defined by the Assessment Act.

I am unable to conclude that there is anything in sec. 18a to warrant our reading "real property" in sec. 28 as restricted to lands or real property other than those falling within sec. 18a. And it seems to me that the assessor is still bound when estimating values under sec. 18a to apply the rule of sec. 28. That being so, the method of ascertaining the sum to represent the actual cash value remains as before the amendment.

I suppose no one disputes that sec. 28 provides a rule at once intelligible and apt for ascertaining the assessment value of the kind of real property to which it was designed to apply.

The difficulty still remains however in applying it to the class of property which has been constructively converted into land or real property, though not really clothed with the ordinary attributes of real property. In dealing with property such as is in question here for the purpose of placing a value upon it, an assessor or an appraiser sees to begin with that there is a parcel of real estate proper. Standing upon that there are buildings and improvements so constructed and placed as to form part of the realty and for that reason to be treated as lands. So far he would feel no difficulty. These are exactly what the Legislature contemplated when enacting what is now sec. 28. They can be appraised and the actual cash value ascertained by a competent person without any great trouble. But the assessor or appraiser finds that the land, building, and improvements are but a central point in a system of applied mechanism extending over a large area far beyond the limits of the parcel of land and perhaps beyond the limits of the municipality, consisting in some cases of rails, ties,

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poles, and wires, and in others of poles, wires, telephones, and other plant; that for the establishment, installation, and active practical operation of such a system, privileges, rights, and franchises have been procured, without the possession of which the system cannot be rendered available; and that these privileges, rights, and franchises are not capable of simple transfer from hand to hand. How is he to apply the rule of the statute? He must, of course, take into consideration all the circumstances and conditions. The questions he must decide are:—Suppose the telephone, electric light, or railway company, to be a debtor, but solvent, what of this property could it hand over to a creditor in payment of his claim? And what would be the value to the creditor of the thing handed over? In dealing with the first question he finds that the company cannot hand over the whole entire system with all the rights, powers, privileges, and franchises which are necessary in order to continue working it. This is beyond its power, and the law does not provide any way in which it can be done. The company can only hand over its lands, buildings, and improvements, together with the plant and materials, forming the skeleton of the system. But that which imparts vitality the company cannot give. And so the creditor can only receive an inert body or aggregation.

And it is to this that the assessor or appraiser must endeavour to attach a value according to the rule of the statute. If the company attempted a sale, the purchaser, in the absence of legislation to implement his purchase, would acquire no more than the creditor could obtain. Suppose the property in this condition in the hands of a creditor or purchaser while the assessor is making his rounds. How would he proceed to estimate it at its actual cash value except by estimating its real value to its then owner? Actual cash value means the real as opposed to the potential, possible, or conjectural value. He would be obliged to ascertain by the best means in his power, and taking into consideration all the existing circumstances, the sum of money the property would bring if sold for cash. If he ignored the existing conditions he would not be acting according to the rule of the statute.



The English cases furnish no analogy or guide. They are principally decisions under the Imperial Act 6 & 7 Will. IV. ch. 96 and similar Acts.

The rule for ascertaining ratable value, under sec. 1 of the Imperial Act, has not been found free from difficulty, and in some instances the endeavour to apply it to new circumstances has led, it has been said, to rather startling results. But it seems to me to be much easier of application than the rule of sec. 28. Under sec. 1 of the Imperial Act the rate is to be made upon an estimate of the net annual value—that is to say, of the rent at which the hereditament might reasonably be expected to let from year to year. In other words you ascertain what the hereditament is, and having done so you proceed to ascertain the annual value of its occupation, and the ascertainment of this hinges on one point, viz.: What would such hereditament reasonably be expected to let at from year to year? The hypothetical tenant is introduced for the purpose of ascertaining the value of the occupation and not for the purpose of ascertaining the nature of the hereditament.

And as the ascertainment of the nature of the hereditament—that is the thing capable of being occupied by a tenant—precedes the introduction of the hypothetical tenant, so here the ascertainment of the thing capable of being transferred to a creditor or purchaser must precede the introduction of a creditor or purchaser, hypothetical or otherwise, for the purpose of fixing the value to him of the thing to be transferred.

According to the statement of Lord Herschell in *London County Council v. Churchwardens, etc., of Parish of Erith*, [1893] A.C. 562, at p. 588, the description “hypothetical tenant” is gathered from the language of sec. 1 of the Imperial Act. It is a question whether the language of sec. 28 is so suggestive, but allowing that construction will not make the English cases applicable.

I think the appeals fail.

LISTER, J.A., died while the appeals were under consideration.

*Appeals dismissed; MACLENNAN, J.A., dissenting.*

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## [DIVISIONAL COURT.]

## CARR V. O'ROURKE.

D. C.

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May 3.

*Executors and Administrators—Surrogate Courts—Grant of Administration—  
Nominee of Next of Kin in Ontario—Discretion—Revocation—Fraud.*

Only one of the next of kin, the sister, of an intestate resided in Ontario, and, upon the consent of the sister and her children, letters of administration were granted by a surrogate court to the defendant, the husband of the sister's daughter. A brother of the intestate, resident in the United States, brought this action to revoke the grant. It was stated in the defendant's petition that all of the next of kin had renounced in his favour, but it was plain from the renunciation, which was filed, that this statement was intended to refer only to the next of kin resident in Ontario:—

*Held*, that the surrogate court had before it all those who were required by sec. 41 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, to be cited or summoned, and the consent and request of all of them that the defendant should be appointed administrator, and, having regard to the nature of the property of the deceased, and the advanced age and illiteracy of his sister, that the Judge had not exercised his discretion improperly in directing the grant to be made to the defendant.

*Seemle*, that, even if the discretion had been improperly exercised, the grant would not have been revoked.

The practice of the surrogate courts in this Province is to apply the provisions of sec. 59 of the Act more liberally than do the English Courts the corresponding provision of the English Probate Act.

*Held*, also, affirming the finding of the surrogate court, that the defendant had not made false suggestions nor concealed material facts for the purpose of obtaining the grant.

AN appeal by the plaintiff from the judgment of the surrogate court of the county of Kent, pronounced at the trial on the 7th September, 1901, before the Judge of that court sitting without a jury, by which the action was dismissed with costs.

The action was brought for the purpose of having it declared that the plaintiff alone, as the only lawful brother of one Daniel Carr, who died intestate on the 29th November, 1900, was entitled by law to a grant of letters of administration of his estate, and for the cancellation and revocation of the letters of administration granted by the surrogate court of the county of Kent on the 9th January, 1901, to the defendant, and for the grant of letters of administration to the plaintiff.

The appeal was heard by a Divisional Court composed of MEREDITH, C.J., and LOUNT, J., on the 27th and 28th January, 1902.

M. Wilson, K.C., and J. B. O'Flynn, for the appellant.

A. B. Aylesworth, K.C., for the defendant.

May 3. MEREDITH, C.J.:—According to the allegations of the statement of claim the next of kin of the deceased consisted of the appellant Mary Payne, a sister of the intestate, who resides in the county of Kent, and Timothy Downie and James Downie, children of Bridget Downie, a deceased sister of the intestate.

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It is also alleged that the intestate had another sister, Catharine Kelly, who predeceased him, leaving four children surviving her, none of whom, it is alleged, has been heard of for upwards of thirty years, and another brother Lawrence, who left Chatham and went to reside in the United States of America about thirty-five years ago, and has not been heard of for upwards of thirty-two years.

The respondent is the husband of Alice O'Rourke, a daughter of Mary Payne, and a brother-in-law of Robert Daniel Payne, a son of Mary Payne.

The appellant alleges that the respondent, in order to procure the letters of administration to be granted to him, falsely and fraudulently represented to the court that all of the next of kin of the intestate had renounced their right to administration in his favour, and falsely and fraudulently represented to the court that Mary Payne, Alice O'Rourke, and Robert Daniel Payne were the only next of kin of the deceased.

Alice O'Rourke and Robert Daniel Payne, as I have said, are children of Mary Payne, but it is alleged that she has four other children living, all of whom are, it is also alleged, entitled to administration of the estate of the deceased in priority to the respondent, "and competent and eligible."

In the statement of claim it is also alleged that the respondent, in the interest and at the request of Robert Daniel Payne, surreptitiously and fraudulently, without the knowledge, concurrence, or consent of the appellant, obtained the letters of administration which were granted to him, with the design of enabling Payne to obtain from the respondent a release of Payne's obligation to account to the estate of the intestate in respect of his dealings with it as committee of the person and estate of the intestate, who was a lunatic.

The learned Judge found that none of the charges of fraud made against the respondent was established; that the appellant

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was not a proper person to be appointed administrator; that he was at the time the letters of administration were applied for by the respondent, and had been for thirty-five years, a citizen of and domiciled in the United States of America; and that he was practically blind, and, therefore, unable to read or write, and, from physical infirmities through age and otherwise, not a fit and proper person to be appointed; that Mary Payne was the only one of the next of kin residing in Ontario; that the respondent is the husband of a niece of the intestate; that he was and is a fit and proper person to act as administrator, and that he was appointed after renunciation in his favour by Mary Payne, and by Alice O'Rourke and Robert D. Payne, a niece and nephew of the intestate; and the learned Judge states that it has not been the practice of his court to require persons residing out of Ontario to be cited, if some one of as near a degree of relationship and otherwise fit and proper, or the appointee of such a person, if otherwise fit and proper, makes application for letters.

On these findings and for these reasons the learned Judge dismissed the action with costs.

It was contended by Mr. Wilson, on the argument before us, that the respondent had no interest entitling him to the grant, and that he had fraudulently obtained it to be made by false suggestion and concealment of material facts, or, at all events, by a false suggestion even if not made *malá fide*, and that the appellant was therefore entitled to have the letters of administration revoked.

The learned Judge has found against this contention, and properly so, I think, for there was, in my opinion, neither a false suggestion nor any concealment of material facts.

The status of the respondent was shewn in the affidavits to lead grant to be that of husband of Alice O'Rourke, a daughter of Mary Payne who is a sister and one of the next of kin of the deceased, and of nominee of the said Mary Payne, and of Robert L. Payne and his own wife, for the office of administrator; and, although it is stated in his petition that all of the next of kin had renounced in his favour, it is made plain from the renunciation, which was filed, that this statement



was intended to refer only to the next of kin of the deceased who were resident in the Province of Ontario.

Section 59 of the Surrogate Courts Act (R.S.O. 1897, ch. 59) provides that in the case of a person who has died intestate, where it appears to be necessary or convenient, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the property of the deceased, or of any part of it, other than the person who but for the provision of the section would have been entitled to a grant of administration, it is not to be obligatory upon the court to grant administration to the person who but for the section would have been entitled to the grant, but the court is empowered in its discretion to appoint such person as the court thinks fit to be the administrator.

The cases decided on the analogous provision of the English Court of Probate Act, 1857 (20 & 21 Vict. ch. 77), have given a somewhat narrow construction to it, and it is possible that on the facts of this case the English Probate Court might not have exercised its discretion in favour of making the grant to the respondent.

By the provisions of sec. 41 of the Surrogate Courts Act, it is only the next of kin resident in Ontario who are required to be cited or summoned where the application is made by a person not entitled to the grant as next of kin of the deceased.

The surrogate court, therefore, had before it all those who are required to be cited or summoned, and the consent and request of all of them that the respondent should be appointed administrator, and, having regard to the nature of the property left by the deceased, which consisted of a farm as well as of considerable personal property which required to be looked after, and the age of Mary Payne and her illiteracy, it cannot be said, I think, that the learned Judge exercised his discretion improperly in directing the grant to be made to the respondent.

The practice of the surrogate courts of this Province appears to be to apply the provisions of sec. 59 more liberally than do the English Courts the corresponding provision of the English Probate Act, and I see no reason why the more liberal practice which has been adopted in this Province should not be continued.

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Fraud and misrepresentation being out of the case, and the surrogate court having exercised its discretion in favour of making the grant to the respondent, I doubt whether the case would be one for the revocation of the grant, even if it appeared that the discretion had been improperly exercised.

I have found no case in which, since the enactment of sec. 73 of the English Probate Act, which is the corresponding section to sec. 59 of our Act, a grant has been revoked because it has appeared that it was made in circumstances which, according to the practice of the Probate Court, it was not usual to treat as special circumstances within the meaning of sec. 73.

Cases decided before the change in the law effected by sec. 73 was made are distinguishable, because before that change it was obligatory on the court, in case of intestacy, to commit the administration to the next and most lawful friends of the deceased (31 Edw. III. ch. 11), or to the widow of the deceased, or to the next of his kin, or to both (21 Hen. VIII. ch. 5, sec. 3), and, therefore, the court had no jurisdiction to commit the administration to a stranger, but now the court is empowered, by sec. 59, in its discretion, to commit the administration to a stranger, if there are special circumstances which, in its opinion, make it necessary or convenient to do so.

Upon the whole, I am of opinion that the appeal fails and should be dismissed with costs.

LOUNT, J.:—I agree.

T. T. R.

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[LOUNT, J.]

IN THE MATTER OF AN ARBITRATION BETWEEN THE CORPORATION OF THE CITY OF KINGSTON AND THE KINGSTON LIGHT, HEAT, AND POWER COMPANY.

1902

March 14.

*Company—Franchise—“Works, Plant, Appliances and Property”—Purchase by Municipal Corporation of Gas Works—Ten per cent. Addition—R.S.O. 1887, ch. 164, sec. 99.*

By agreement between the city of Kingston and the company the former was to have the option of purchasing and acquiring “the works, plant, appliances and property of the company used for light, heat and power purposes” upon giving the company notice as therein provided at a price to be fixed by arbitration under the Municipal Act. The majority of three arbitrators in fixing the value of the works, plant, appliances and property, did not include anything for the earning power or franchise and rights of the company:—

*Held*, that they were right, for by the fair interpretation and construction of the agreement the word “property” must be limited by the preceding words, the rule of *ejusdem generis* applying:—

*Held*, also, that there being here no expropriation, but a voluntary agreement and submission, the provisions of R.S.O. 1887, ch. 164, sec. 99, as to adding ten per cent. to the amount ascertained by the arbitrators as the value, had no application.

AN appeal by the company from an award of the arbitrators appointed in this matter, or for an order setting aside the award or referring it back to the arbitrators.

By an agreement between the parties, dated July 14th, 1896, having five years to run from January 1st, 1897, it was agreed that at the expiration of a certain contract contained in the agreement, the corporation should have the option of purchasing and acquiring all the works, plant, appliances and property of the company used for light, heat and power purposes, both gas and electric, upon giving to the company one year’s notice of their intention previous to the expiration of the period of the contract at a price to be fixed by three arbitrators to be chosen as therein mentioned, such arbitration to be held under the provisions of the Municipal Act.

Notice by the corporation was duly given. The arbitrators—Judge McDougall for the corporation, Judge Price for the company, and Judge MacTavish, the third arbitrator, chosen by the other two arbitrators—were duly appointed.

The arbitrators entered upon the reference, and made their award on November 15th, 1901, which is as follows:—

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"We find and fix the value of the works, plant, appliances and property of the company used for light, heat and power purposes, both gas and electricity (not including anything for the earning power or franchise and rights of the company) at one hundred and seventy thousand, three hundred and seventy-three dollars (\$170,373). Judge MacTavish and Judge McDougall, two of the said arbitrators (Judge Price being of the contrary view) are of opinion that upon the true construction of the agreement of July 14th, 1896, between the said parties above referred to, the said company is not entitled to be allowed any sum as the value of the franchise or rights conferred upon the said company by 54 Vict. ch. 107 (O.), or otherwise.

"In fixing the price referred to in clause 11 of the said agreement, the said arbitrators, however, have heard and considered evidence upon the value of the said franchise and rights, and place the value of the same at the sum of eighty thousand dollars (\$80,000) if the company is entitled to any sum therefor.

"The arbitrators have not included any amount representing the ten per cent. addition provided for in sec. 99 of R.S.O. 1887, ch. 164, and incorporated with 54 Vict. ch. 107 (O.), in arriving at the said sum of one hundred and seventy thousand, three hundred and seventy-three dollars or the said sum of eighty thousand dollars; Judge Price contending that to the present value ten per cent. should be awarded to the company."

From this award the company now appeal, asking that it be set aside or referred back on the following grounds: 1st. That in addition to the amount allowed to the company by the award, the \$80,000 found by the arbitrators to be the value of the franchise or goodwill was part of the company's property which the arbitrators were required by the agreement of reference to value and allow to the company;

2nd. That the valuation of the works, plant, appliances and property of the company be increased by \$80,000, as being part of the actual value thereof as a going concern;

3rd. Or that to the value of the works, plant, appliances and property ten per cent. of the amount of value placed



thereon be added in accordance with the direction of the statutes referred to in the award ;

4th. Or by way of appeal that the conclusions denying the right of the company to have the value of the franchise or goodwill allowed is erroneous, and the value of the franchise or goodwill should have been allowed to the company as part of their claim ;

5th. Or that the \$80,000 should have been, but was not, added to the value of the said works, plant, appliances and property of the company ;

6th. Or that the arbitrators should in any event have allowed the said ten per cent. and have added the same to the amount of the award.

The motion was argued on December 5th, 1901, before LOUNT, J., in Weekly Court.

D. M. McIntyre, for the City of Kingston, took the preliminary objection that there was no indication of any mistake in law or fact on the face of the award, and no ground for referring it back, and that there was no provision allowing an appeal in this case: *McRae v. LeMay* (1889), 18 S.C.R. 280; *Dinn v. Blake* (1875), L.R. 10 C.P. 388; and *Green v. Citizens' Insurance Company* (1890), 18 S.C.R. 338.

R. T. Walkem, K.C., and J. L. Whiting, K.C., for the company, contended that apart from the provision in sec. 10 of 54 Vict. ch. 107 (O.), providing for the right of the city to purchase, the company had a perpetual franchise; that there were thirteen years for it yet to run before the city could have interfered, apart from the agreement of July, 1896; that the \$80,000 found to be the value of the franchise should have been added to the amount found due as purchase money, and the Court had jurisdiction to refer the matter back on that account: *Re Grand Trunk Railway Company of Canada and Petrie* (1901), 2 O.L.R. 286; *In re Christie and Toronto Junction* (1895), 22 A.R. 21, 25 S.C.R. 551; R.S.O. 1897, ch. 223, sec. 462, sub-sec. 1, sec. 464; Biggar's Municipal Manual, p. 490; that "property" includes goodwill: Bouvier's Law Dictionary, and the Century Dictionary *sub voc.* Property; Williams on Personal Property, 13th ed., p. 10; that there was

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no consideration proceeding from the city for the sacrifice of the company's property if the present award stood; that the general rule of construction is that words are to have their full meaning unless some reason be shewn for their being cut down under the rule of *ejusdem generis*: *Anderson v. Anderson*, [1895] 1 Q.B. 749, at p. 753; that here "works, plant, and appliances" virtually embraced all the tangible property, and therefore the other word must have been introduced to cover something else, namely, intangible property or franchise: *Fenwick v. Schmalz* (1868), L.R. 3 C.P. 313, at p. 315; that in *Re Toronto Street R.W. Co.* (1892-3), 22 O.R. 374, 20 A.R. 125, [1893] A.C. 511, which the arbitrators evidently followed, there was a question whether there was a franchise at all, and it was assumed on both sides that if there was a franchise it would have to be paid for. They also referred to *Re McLellan and Township of Chinguacousy* (1898), 18 P.R. 246; *In re Town of Cornwall and Cornwall Waterworks Co.* (1898), 29 O.R. 350; *Queen v. Cambrian Railway Co.* (1871), L.R. 6 Q.B. 422, at p. 427; *American & English Encyclopedia*, 2nd ed., vol. 14, p. 6.

*McIntyre*, for the City of Kingston, contended that the arbitrators could no more take the franchise into consideration than they could future profits, for they were really the same thing: *Edinburgh Street Tramways Co. v. Lord Provost, etc., of Edinburgh*, [1894] A.C. 456, at pp. 465-471; *Stockton and Middlesborough Water Board v. Kirkleatham Local Board*, [1893] A.C. 444; that the city never contracted to buy the franchise, nor were any of the words "works, plant, appliances and property" wide enough to cover it; that these are in their natural sense applicable to tangible property, "property" being controlled by the previous words: *Edinburgh Street Tramways Co. Case*, [1894] A.C. 456, at p. 471; *Elphinstone on Interpretation of Deeds* (Bl. ed.),\* pp. 173-176; that the other clauses in the agreement indicated that the property taken over was property capable of severance, which the franchise was not; that the company bound themselves by clause 15 of the agreement; that having received what they were entitled to, they would cease to exist; that 11 Vict. ch. 13 and 54 Vict. ch. 107 (O.), shew that the franchise was personal to the company and

not an assignable asset, and the company would have no right to sell it: *Edinburgh Street Tramways Co. Case*, [1894] A.C. 456, at pp. 463-4, 474; nor could the city contract to purchase the franchise, nor would it be any use to them, as they had a franchise under the Municipal Act; he also referred to *In re London City Council and London Street Tramways Co.*, [1894] 2 Q.B. 191, at pp. 200-1; that as to adding 10 per cent. to the price, the arbitrators would have had no right to do it, as they were proceeding under a voluntary submission pursuant to a voluntary agreement: *In re Wilkes' Estate* (1880), 16 Ch. D. 597; Cripps' Law of Compensation, 3rd ed., p. 121.

*Walkem*, in reply, contended that the intention of the agreement was that the company should be placed in the same position as it would have been in at the end of the period of its franchise, and so should have the 10 per cent., and the agreement should be construed in such a way as to do justice to the parties.

March 14. LOUNT, J. [having stated the facts as above]:— Counsel for the corporation took the preliminary objection that under the agreement the submission being a voluntary one, and with no provision for an appeal from the award, it is final. I heard argument on this objection and on the merits, but from the conclusion I have come to on the merits I have not felt it necessary to dispose of the preliminary objection.

It was strongly urged upon me by counsel for the company that the word "property," as used in the agreement, included the franchise or goodwill of the company, and therefore the \$80,000 should have been allowed by the arbitrators in fixing the price for 'all the works, plant, appliances and property of the company used for light, heat and power purposes, both gas and electric.' I have not been able to reach this conclusion. In my opinion, the determination of the question is not to be decided by the meaning to be attached to the word "property," but by the fair interpretation and construction of the agreement.

By 54 Vict. (1891) ch. 107, sec. 10 (O.), it is provided that sec. 35 of the Act 11 Vict. ch. 6, incorporating the City of Kingston Gas and Light Company "is repealed" (this section provided that the Act shall be and remain in

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force for fifty years and no longer) "but at any time from and after the expiration of twenty years from the passing of this Act the corporation of the city of Kingston, shall have the right, on giving twelve months' notice to the Kingston Light, Heat and Power Company of such their intention, to expropriate the works and property of the said company under and in accordance with the provisions of the general Act in that behalf, being ch. 164 of the Revised Statutes of Ontario, 1887, or any Act amending the same; and the said corporation shall have and possess all the powers, rights and privileges conferred by the Legislature of Ontario on any company incorporated under R.S.O. 1887, ch. 165, or on municipalities by R.S.O. 1887, ch. 191, and nothing in this Act contained shall affect the rights and powers of the said corporation under the last named Act or under any Act of the Legislature of Ontario passed or to be passed."

This Act was passed on May 4th, 1891, and but for the right of the corporation to expropriate the works and property at the expiration of twenty years from the passing thereof, the company would have a fifty years' franchise. The right of the corporation to expropriate under section 10 would, but for the agreement of July 14th, 1896, be not before May 4th, 1911. The parties, however, by the agreement agreed that at the expiration of this contract—that is, five years from the 1st day of January, 1897—the corporation shall have the option of purchasing and acquiring all the works, plant, appliances and property of the company used for light, heat and power purposes, both gas and electric, upon giving the company one year's notice of their intention previous to the expiration of the period of the contract, at a price to be fixed by arbitrators, etc., and that such arbitration shall be proceeded with forthwith after the giving of the said notice, and shall be held under the provisions of the Municipal Act.

The submission to arbitration is a voluntary one, and not under sec. 10 of 54 Vict. ch. 107.

By clause 12 of the agreement, it is provided that forthwith after the corporation shall have given the notice of their intention to exercise their option, the corporation shall have access to the works, plant, property and appliances of the company.



By clause 15 it is provided that in the event of the works, plant and property of the company being acquired by the corporation, then the company shall cease to exist as a corporate body for the purposes for which they were constituted, except as far as may be necessary to wind up the affairs of the company, and shall surrender, assign, transfer and set over to the corporation all their rights, franchises, privileges and immunities. In my opinion the word "property," as used in these clauses, can only be held to mean tangible and not intangible property, such as the franchise or goodwill of the company.

The corporation were not under any necessity to purchase and acquire the franchise of the company; for all purposes necessary, the corporation could and can operate under and by virtue of the Municipal Light and Heat Act, R.S.O. ch. 191. What was agreed to be paid for under clause 11 are the works, plant, appliances and property used for light, heat and power purposes. I think the doctrine of *ejusdem generis* applies. In *Anderson v. Anderson*, [1895] 1 Q.B. at p. 753, Lord Esher, M.R., says: "Nothing can well be plainer than that to shew that *primâ facie* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before."

The word "property" as used in the agreement is on the fair construction of the instrument limited to the preceding words, and these words are not to be construed so as to include such an intangible right as the franchise or goodwill of the company.

In *Church v. Mundy* (1808), 15 Ves. 396, at p. 406, Lord Eldon said: "The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declarations plain to the contrary."

The limited sense is, I think, shewn in clause 12, where it is provided that the corporation shall have access to the works, plant, property and appliances of the company. What is here

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meant is that the corporation shall have access to the tangible property. Again, the 15th clause provides "that in the event of the works, plant and property being acquired by the corporation, the company shall cease to exist as a corporate body for the purposes for which they are constituted, except so far as may be necessary to wind up the affairs of the company, and shall surrender, assign, transfer and set over to the corporation all their rights, franchises, privileges and immunities." That is, as I read it, the corporation having acquired the tangible property at a price to be fixed by arbitration, the company ceases to exist, and, as part of the bargain, surrender or yield up without other consideration their franchise and rights.

Moreover, by clause 15, the "words rights, franchises, privileges and immunities" are expressly used, and these words are not used in the preceding clauses. If it had been intended that the value of the rights, franchises, privileges and immunities were to be paid for at a price to be fixed by the arbitrators, one would expect to find express provision made or appropriate words used in clauses 11 and 12.

By the agreement the rights and privileges of the company were terminable at the option of the company in twenty years—that is, in May 1911—at which time, if the corporation should elect to purchase the works, etc., the privileges and franchises of the company would cease to exist.

See *The Toronto Street Railway Company v. The City of Toronto*, 20 A.R. 125, and in appeal, [1893] A.C. 506, where Sir Richard Couch, at p. 515, quotes with approval from the judgment of Burton, J.: "We are dealing, therefore, with the license or consent given for that fixed term of thirty years, at the expiry of which, according to my reading of the agreement, the corporation having elected to exercise its option of purchasing, the privileges or franchises of the railway company ceased."

The parties having agreed to accelerate the time and shorten the period from twenty to five years, the same conclusion would apply at the end of five years as would be applicable at the end of twenty years—the privileges and franchises of the company would cease.

As to the right of the company to have ten per centum added to the valuation fixed for the works, plant, appliances and property, I do not see how this can be upheld. By R.S.O. 1887, ch. 164, sec. 99, "The arbitrators in determining the amount to be paid for such works and property, shall first determine the actual value thereof, having regard to what the same would cost if the works should be then constructed or the property then bought, making due allowances for deterioration, wear and tear, and making all other proper allowances, and shall increase the amount so ascertained by ten per centum thereof, which increased sum the arbitrators shall award as the amount to be paid by the corporation to the company, with interest from the date of the award." The ten per centum to be allowed by this section is when there has been an expropriation by the corporation of the company's property under the Act, and is allowed apparently as consideration for the exercise of that right of expropriation, and as compensation for disturbance and for the interference with and determination of the company's rights and privileges against the assent of the company.

It is entirely different in this case. There has been no expropriation. The submission to arbitration is voluntary; the terms and conditions are expressed in the agreement; nothing is there said as to any allowance of ten per centum. This agreement must control, and not the provision of sec. 99 of the Act referred to.

Motion dismissed with costs.

A. H. F. L.

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## [DIVISIONAL COURT.]

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RANKIN V. STERLING.

April 8.

*Vendor and Purchaser—Possession by Purchaser under Contract—Waiver—Improvements.*

Where a purchaser of real estate by the terms of the contract entitled to a perfect title, upon payment of the deposit entered into and continued in possession as provided by the contract, and made improvements even after alleged defects in the title were brought to his attention, and after he had brought an action for specific performance, the vendor asserting that he had a good title :—

*Held*, that the purchaser had not waived his right to a good title.

In the absence of fraud on the part of the vendor, or other special circumstances, if a purchaser takes possession under the contract and the vendor is unable to make a good title, the purchaser is not entitled to be repaid the amount expended by him in improvements.

Judgment of MacMahon, J., reversed in part.

THIS was an appeal from the judgment of MacMahon, J., at the trial in an action brought by William C. Rankin against James E. Sterling.

The following statement of facts is taken from the judgment of Street, J., in the Divisional Court.

This was an action for the specific performance of a contract, dated 23rd February, 1901, by which the defendant agreed to sell to the plaintiff for the sum of \$380 a village lot in the village of Campbellford.

By the terms of the contract the purchaser was to pay \$75 down and thereupon was to be let into possession; and was to pay the balance, \$305, with interest at six per cent. on or before 1st May, 1901. Conveyance to be made on payment of the \$305 and interest. Defendant was to furnish abstract, to make out a perfect title and to deliver conveyance at his own expense.

The plaintiff paid the \$75 on 25th February, 1901, and was forthwith let into possession.

There was a house on the property and some outbuildings: the plaintiff pulled down the outbuildings and altered the house in many respects.

An abstract of title was furnished to him early in May. This abstract shewed the title to have regularly passed from the



Crown to one Richard VanNorman, who became owner in 1862, and made a mortgage to his vendor, one Wilkins, which had never been discharged. No title was shewn from either VanNorman or Wilkins to the defendant.

On 18th May, 1901, the plaintiff's solicitor served requisitions pointing out these defects. The defendant's solicitor on 4th June wrote plaintiff's solicitor that there was a title by length of possession at all events and inclosed a statutory declaration to that effect: he at the same time offered to pay back the \$75 and cancel the agreement.

To this the plaintiff's solicitor replied on the 6th June, 1901, stating that his client had spent \$1,000 in improving the property and stating his willingness to cancel the agreement on being repaid this amount as well as the \$75 paid down. This was not agreed to and the plaintiff remained in possession and continued his improvements.

On 2nd July, 1901, the plaintiff's solicitor wrote the defendant's solicitor that the facts stated in the statutory declaration as to the length of possession were incorrect and that "it looks very like as though it would be impossible to get the title made right." The plaintiff, however, continued in possession and spent some \$300 in buildings and improvements between the 1st June and the end of October, 1901, part of it being done in October.

On the 2nd August, 1901, the plaintiff brought this action for specific performance and for damage by reason of the delay: he alleged that he had made permanent improvements.

The defendant filed his statement of defence on 9th October, 1901, stating that he had a good title and had always been ready to convey on payment of the balance of his purchase money. That in any event the plaintiff had waived his right to insist upon a good title being shewn by the acts of ownership which he had done; and he asked that the plaintiff might be ordered to perform the agreement.

The action was tried before MacMahon, J., at Cobourg, without a jury, on 26th November, 1901, when the above facts were proved.

It was also stated in evidence by the defendant's solicitor that he had endeavoured but been unable down to the time the

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action was begun to find Richard VanNorman, in whom the title appeared to be vested.

On the other hand the plaintiff's solicitor stated that he had been seen at a place called Frankfort a few days before the trial.

The parties admitted at the trial that the only objection remaining to the defendant's title was that referred to in the first of the plaintiff's requisitions, which was, "How did title pass from VanNorman?"

The learned trial Judge held that the plaintiff had not waived his right to have a good title shewn and referred it to the Master at Cobourg, to ascertain and report if the defendant has shewn or can shew and make a good title to the lands in question, "having regard to the first objection on the requisitions of the plaintiff in the pleadings mentioned, and if so, at what date such good title was first shewn;" and he further directed that in case the Master should find that the defendant cannot shew and make a good title, he should proceed to ascertain and state the value of the plaintiff's improvements and what would be a fair occupation rent while the plaintiff has been in possession: and he reserved further directions and costs, until after the Master should have made his report.

From this judgment the defendant appealed to a Divisional Court and the appeal was argued on March 7th, 1902, before FALCONBRIDGE, C.J.K.B., and STREET, J.

*J. J. Warren*, for the appeal. The plaintiff went into possession without first searching the title or getting an abstract, and made the improvements without the consent or approval in any way of his vendor. It may be true that part of the improvements were made before he had knowledge of any defect in the title, but he continued making them even after he had knowledge, and he did so at his own risk. The plaintiff cannot succeed; a vendee in an action for specific performance must take the title or have his action dismissed. The objection to this title is irremovable: *In re Gloag & Miller's Contract* (1883), 23 Ch. D. 320, was relied upon by the trial Judge to make the defendant liable, but that case is really in his favour.

Mr. Justice Fry, at p. 329, says that by remaining in possession and making structural alterations after the purchaser had knowledge of the existence of conditions and circumstances affecting the title, over which the vendor had no control, the purchaser waived his right to have the objections removed. There, rescission was sought, here, specific performance is sought. The only damage is the expense of searching the title: *Dart's Vendors and Purchasers*, 6th ed., 1077; *Bain v. Fothergill* (1874), L.R. 7 H.L. 158, at p. 207; *Worthington v. Warrington* (1849), 8 C.B. 134, 18 L.J.C.P. 350. I refer also to Sugden's *Law of Vendors and Purchasers*, 14th ed., p. 254, citing *Donovan v. Fricker* (1821), Jac. 165, *Dart*, pp. 502, 503, 1186; *Nicloson v. Wordsworth* (1818), 2 Swans. 365.

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*G. H. Watson*, K.C., and *W. L. Payne*, contra. The plaintiff had no knowledge of the title. He made a distinct bargain to get a perfect title and to get possession on making the cash payment. He made the payment and got possession. The perfect title was to be made subsequently. He made no election as to possession, but just followed his contract, and was then entitled to treat the property as his own, and assume that the defendant would perform his part of the contract. The objection is not irremovable and we are entitled to the title of the owner on the abstract, (*Van Norman*), or a removal of the objection. The permanent improvements were properly allowed to the plaintiff when the taking possession was in pursuance of the contract and the good title was not made. We refer to *Cato v. Thompson* (1882), 9 Q.B.D. 616, at pp. 617 and 620; *Phillips v. Caldcleugh* (1868), L.R. 4 Q.B. 159; *Davis v. Snyder* (1850), 1 Gr. 134; *Day v. Singleton*, [1899] 2 Ch. 320; *Armour on Titles*, pp. 6 and 20; *Stephney v. Biddulph* (1865), 13 W.R. 576; *Pearl Life Assurance Co. v. Buttenshaw*, W.N. 1893, p. 123; *Ex p. Bennett* (1805), 10 Ves. 380, at p. 400.

*Warren*, in reply, referred to Sugden, p. 550.

April 8. The judgment of the Court was delivered by STREET, J.:—By the terms of the contract the plaintiff was entitled to a perfect title and to go into possession immediately upon the payment down being made.

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The defendant continued to assert that he had a good title in his pleadings and down to the trial, and he has not yet, so far as I have seen, abandoned the assertion, that even if his paper title is defective he has a perfect title under the Statute of Limitations.

Under these circumstances, the fact of the plaintiff's remaining in possession and continuing to make improvements, even after the defects in the paper title had been called to his attention, and after he had brought his action, should not be a waiver of his right to insist upon a good title being shewn. Waiver is a question of intention to be determined from the acts of the parties, and it seems impossible to hold that a purchaser has waived his right to a good title, by acts done at a time when he was insisting upon a good title being shewn; and the vendor was insisting that his title was perfectly good: *In re Gloag & Miller*, 23 Ch. D. 320.

The question of waiver was the only question upon the pleadings, which rendered it necessary that the action should be brought to trial. Had this question not been raised, a judgment declaring the plaintiff entitled to specific performance might have been obtained upon motion; for the only other question raised upon the pleadings, which could be disposed of before the question of title had been determined was that of title, and that would have been referred to the Master upon motion on the pleadings. Having failed upon the question of waiver, therefore the defendant must pay the costs of the hearing. There should also, in my opinion, be a general reference as to title to the Master in order that the defendant may not only shew, if he can, that the title from VanNorman has become vested in him, but also that he may make out a title by possession, that being a title which a purchaser may be compelled to take if it can be satisfactorily established: *Scott v. Nixon* (1843), 3 Dr. & War. 388; *Games v. Bonnor* (1884), 33 W.R. 64; *Dart's Law of Vendors and Purchasers*, 6th ed., 462.

In my opinion there is no ground for the direction in the judgment that the Master shall take an account of the improvements made by the purchaser, in case the vendor is unable to make a good title.



It was stated by counsel for both parties, as their understanding of this part of the judgment, that it was intended that the purchaser should have a charge for his improvements, in case the vendor failed to make out a good title. The judgment does not say so, and upon its face, this is one of the matters to be dealt with on further directions. There is, however, nothing in the pleadings or evidence to take this case at present out of the general rule, which restricts the damages of the purchaser to the costs of the investigation of the title: *Bain v. Fothergill*, L.R. 7 H.L. 158, at p. 207.

Nor is there anything to bring it within the doctrine of *Engel v. Fitch* (1868), L.R. 3 Q.B. 314, and (1869), L.R. 4 Q.B. 659, that a purchaser is entitled to substantial damages from a vendor who, to save himself trouble or moderate expense, or from mere caprice, absolutely refuses, or wilfully neglects to perform, to the best of his ability, his part of the contract. See further as to this, *Williams v. Glenton* (1866), L.R. 1 Ch. 200, at p. 209, and *Day v. Singleton*, [1899] 2 Ch. 320, at pp. 332, 333.

The inquiry into the value of these improvements is one which might lead the parties into a great deal of expense, and it should not be directed unless the liability of the defendant to pay for the improvements has first been established.

The rule followed in the old case of *Nicloson v. Wordsworth*, 2 Swans. 365, and stated by Lord Sugden, 14th ed. at p. 347, is that which still prevails in the absence of fraud or other special circumstances, "If a purchaser take possession under a contract, and afterwards rejects the title, he must relinquish the possession, and equity cannot prevent the vendor from turning him out by an ejectment, although he may have expended money in improvements."

The judgment pronounced should therefore, in my opinion, be set aside and the following judgment should be entered in its stead: Declare that the contract in the pleadings mentioned ought to be specifically performed and order and decree the same accordingly.

Declare that the plaintiff has not waived his right to a good title.

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Refer it to the local Master at Cobourg, to enquire and state whether the defendant can make a good title to the lands in question, and if so, when such good title was first shewn.

Tax to the plaintiff the costs of the trial in any event upon the final taxation of costs.

Reserve further directions and other costs, including the costs of the reference, until after the Master shall have made his report.

The appeal has been only partially successful and there should be no costs of it.

G. A. B.

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## [IN THE COURT OF APPEAL.]

REX v. D'Aoust.

C. A.

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May 8.

*Criminal Law—Evidence—Accused Testifying on His Own Behalf—Cross-examination as to Previous Convictions.*

An accused person who, on his trial for an indictable offence, is examined as a witness on his own behalf, may be cross-examined as to previous convictions.

THIS was a case reserved by the county Judge sitting in the county court judges criminal court of the county of Carleton, at Ottawa, on February 27th and 28th, 1892, on the trial of one Xavier D'Aoust upon an accusation or indictment, charging him with robbery of a sum of money from one Gravelle.

*J. A. Ritchie*, for the Crown.

*E. Mahon*, for the accused.

The case (after setting out the charge, date, etc., as above), stated:—

“The accusation did not charge the prisoner with any previous conviction.

Witnesses were examined for the Crown and for the defence.

The prisoner was sworn and examined on his own behalf, and denied the commission of the offence.

*Mr. Ritchie*, for the Crown, in the course of his cross-examination of the prisoner, put the following question:

‘You have been convicted several times of indictable offences?’

*Mr. Mahon*, for the prisoner, objected that the prisoner could not be questioned as to previous convictions.

After hearing argument, I overruled this objection, and thereupon the prisoner answered the above question in the affirmative; and the following further questions were put to the prisoner and answered by him subject to such objection:—  
[The case then set out questions as to five different convictions for indictable offences, all of which the prisoner admitted.]

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The evidence of previous convictions of the accused had effect upon my mind in arriving at a decision.

I found the prisoner guilty and sentenced him on the 24th day of March, 1902, to nine months' imprisonment in the Central Prison.

Upon the application of his counsel I reserved the following question for the opinion of the Court of Appeal for Ontario:

'Was the evidence of the previous convictions of the prisoner admissible?'

The case was argued on April 18th, 1902, before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and GARROW, J.J.A.

*John R. Cartwright*, K.C., Deputy Attorney-General for the Crown, contended that when an accused person tendered himself and was examined as a witness on his own behalf, he was on the same footing as any other witness, and was not entitled to any special protection.

The prisoner was not represented by counsel on the argument of the appeal; but his counsel at the trial furnished a written argument, which was read by the Deputy Attorney-General to the Court. It was to the effect, that the Crown could not prove the convictions by other witnesses, and that no evidence should be admitted not relevant to the issue: Crankshaw on the Criminal Code, pp. 819-820. When the Canada Evidence Act, 1893, was passed making the accused a competent witness, it was not intended to alter the nature of the evidence on the trial of an accusation, or it would have been made clear by express legislation. The accused is protected where, under section 676 of the Code, he is charged with an offence after previous convictions; he must be found guilty of the offence before the previous convictions can be referred to, although charged in the indictment. The accused being on trial, puts him on a different footing from an ordinary witness; he may be harmed, while the witness is not. No evidence of character was given here, to call for evidence of previous convictions to counteract it. While an accused person may be cross-examined as laid down in *The Queen v. Connors* (1893), 5 Can. Cr. Cas. 70, at p. 72, such cross-examination is restricted to the issue or



charge: 3 Russell on Crimes, 6th ed., p. 403; and as the evidence admitted affected the mind of the Judge, there should be a new trial.

May 8. ARMOUR, C.J.O.:—The accused was charged with robbery, and being called as a witness on his own behalf, was asked by the counsel for the Crown, on cross-examination, whether he had not been convicted several times of indictable offences.

This question was objected to by counsel for the accused, but was allowed by the learned trial Judge, and was answered by the accused in the affirmative.

Counsel for the Crown thereupon questioned the accused as to five previous convictions, all of which the accused admitted, and the question submitted to us is whether the evidence of the previous convictions of the accused so obtained was admissible.

In the Imperial Criminal Evidence Act, 1898, 61 & 62 Vict. ch. 36, there is a provision that a person charged and called as a witness in pursuance of that Act shall not be asked, and if asked shall not be required to answer, any question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless under the circumstances in the said Act set forth.

But in the Canada Evidence Act, 1893, as amended by 61 Vict. ch. 53, and by 1 Edw. VII. ch. 36, there is no such provision, nor is there any other provision limiting in any way the cross-examination of a person charged with an offence who becomes a witness on his own behalf.

I am of the opinion, therefore, that the evidence of the previous convictions, elicited on the cross-examination of the accused, was admissible.

OSLER, J.A.:—The prisoner was tried at a session of the county judges criminal court at Ottawa upon an accusation or indictment charging him with the offence of robbery of a sum of money from one Gravelle.

He was sworn and examined on his own behalf, and denied the commission of the offence.

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In the course of his cross-examination by counsel for the Crown, he was asked the following question: "You have been convicted several times of indictable offences?"

Counsel for the prisoner objected that he could not be questioned as to previous convictions. After argument, the objection was overruled, and the prisoner thereupon answered the question in the affirmative, and other questions were put to the prisoner as to five convictions for indictable offences, and answered by him, subject to such objection.

No evidence of good conduct had been adduced on behalf of the prisoner.

The learned Judge of the county court reported that the evidence of previous convictions of the accused had effect upon his mind in arriving at a decision, and he found the prisoner guilty, and sentenced him on the 24th March, 1902, to nine months' imprisonment in the Central Prison.

Upon the application of his counsel, the Judge reserved the following question for the opinion of the Court of Appeal: "Was the evidence of the previous convictions of the prisoner admissible?"

In my opinion this question admits only of an answer in the affirmative.

By statute—the Canada Evidence Act, 1893, and its amendments, 61 Vict. ch. 53 and 1 Edw. VII. ch. 36—it is enacted that every person charged with an offence shall be a competent witness. Such person is not a compellable witness, and therefore cannot be directly called upon to testify by or on behalf of the Crown.

When this provision was introduced, it had long been the law as now found in sec. 695 of the Criminal Code, 1892, that a witness might be questioned as to whether he had been convicted of any offence, and if upon being so questioned he either denied the fact or refused to answer, "the opposite party" might prove such conviction by a certificate of the proper officer, in manner and form prescribed by section 694, and by proving the identity of the witness, as such convict.

The right, and if such it can be called, the privilege, of the accused now is to tender himself as a witness. When he does so he puts himself forward as a credible person, and except in

so far as he may be shielded by some statutory protection, he is in the same situation as any other witness, as regards liability to and extent of cross-examination.

The Imperial Criminal Evidence Act, 1898, 61-62 Vict. ch. 36, carefully provides that a person charged and called as a witness on his own behalf shall not, except under certain specified circumstances, be asked, and if asked, shall not be required to answer, questions tending to shew that he has committed or been convicted of or charged with any offence other than that wherewith he is then charged, or is of bad character.

This may have been done out of tenderness for the accused, who may feel himself, as he no doubt in most cases is, under a sort of moral compulsion to give evidence for himself, the Act having removed his previous disability in that respect, or it may have been in order to avoid any, even apparent, inconsistency with the provision, corresponding to that of section 676 of the Criminal Code, which deals with the proceedings upon an indictment for committing an offence after a previous conviction or convictions.

There, the prisoner is to be arraigned in the first instance upon so much only of the indictment as charges the subsequent offence; the trial of the question as to previous convictions being deferred until he shall have been found guilty of that offence.

Our Criminal Evidence Act contains no sections corresponding to those of the Imperial Act; the only exception it makes to the competence of the accused to testify being in respect of communications made by husband to wife or by wife to husband during their marriage.

Practically, therefore, although the provisions of section 676 must be complied with, whenever it is intended for the purpose of imposing an increased punishment, to try the question whether the accused has been convicted of previous offences, he incurs the risk if he chooses to testify on his own behalf of having such convictions proved against him for the purpose of affecting his credit, and thereby incidentally of prejudicing his position with the jury in regard to the charge, then on trial

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—a risk which, by the Imperial Act, it has been deemed proper to exclude.

In the case before us the questions were proper, and the testimony they were intended to elicit relevant to the issue, as going to the credit of the witness, and as authorized by section 695 of the Code.

The accused, instead of refusing to answer, stated without objection what was probably the truth. Had he denied the facts or refused to answer, the only consequence would have been that the Crown might have proved the previous convictions in the manner above stated.

It is, therefore, clear that evidence of these convictions by the accused's own admissions was proper, and that it was open to the learned Judge to draw therefrom any inferences favourable or unfavourable to the accused of which it was justly susceptible.

MACLENNAN, MOSS, and GARROW, JJ.A., concurred.

G. A. B.

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## [IN THE COURT OF APPEAL.]

## REX V. HANRAHAN.

C. A.

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May 8.

*Criminal Law—Keeping Disorderly or Common Betting House—Race Track of Incorporated Association—Conviction—Code sections 197 and 204.*

The defendant was tried and convicted by a police magistrate for keeping a disorderly or common betting house.

In a case stated by the magistrate, in which he reported that it was shewn that a house was kept and used for betting between persons resorting thereto and the keeper: that the accused appeared and he found him to be the keeper: that the house was owned by a joint stock company of which the accused was president and was situated on the race track of an incorporated association: that there were about thirty persons betting with the accused and his assistants, some on races then in progress in the State of New York with which there was telegraphic communication, and others on races in progress on the local race track conducted by the company under an agreement with the association:—

*Held*, that the offence was the keeping of a house for the purposes prescribed by sec. 197 of the Code, and that the facts proved brought the accused within its danger and he was rightly convicted:—

*Held*, also, that sub-sec. 2 of sec. 204 of the Code stands by itself and that the exception contained in it is expressly limited to the first part of that section, and it should not be read into sec. 197.

SPECIAL case stated for the opinion of the Court of Appeal pursuant to leave granted.

The facts and stated case appear in the judgment of OSLER, J.A., and the case was argued on April 18th, 1902, before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and GARROW, JJ.A.

*E. F. B. Johnston*, K.C., for the defendant. The magistrate has found that races were going on in two places—on the track where the house or club was, and at Morris Park in New York State—and that persons in the club were betting on both races. The conviction was made under secs. 197 and 198 of the Code, but those sections must be read with sec. 204, which makes the betting on the local races lawful; and so betting on the other races at the same time and place would be no offence. Section 197 creates no offence in respect to betting, but relates merely to *keeping* the house, and only defines, but imposes no penalty. If the accused comes within sec. 204, he does not keep a common betting house. The general sweeping effect of sec. 197 is not extended to the betting on the local races, which is protected by sec. 204. Where a statute is silent as to time and place, the

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Court will not supply the defect in the case of a crime: *The Queen v. Brown* (1894), 64 L.J. Mag. Cas. 1 at p. 7. Betting is no offence, except where made so by statute. The place is the evil aimed at. This race-course is reserved by sec. 204 as a place where betting may be carried on, and to constitute a gaming-house the betting must be illegal. Sec. 204 makes the betting here complained of lawful. To do a lawful act does not make the place where it is done an unlawful place: *Stratford Turf Association v. Fitch* (1897), 28 O.R. 579; *Powell v. The Kempton Park Race-course Co. Ltd.*, [1899] A.C. 143. I refer also to *Regina v. Smiley* (1892), 22 O.R. 686.

*John R. Cartwright*, K.C., Deputy Attorney General, and *Frank Ford*, for the Crown. Section 204 stands by itself and does not deal with keeping a common betting house; and the provision in sub-sec. 2 is limited to the first part of the section. The Legislature never intended that betting on races all over the world would be protected under that section. The place was used for the purpose of betting; persons resorted there for that purpose, and betting took place with the keeper (the accused) and his assistants, and this case is covered by sec. 197. The statute should receive a liberal construction: *Walsh v. Trebilcock* (1894), 23 S.C.R. 695 at p. 706. We also refer to *The Queen v. Cook* (1884), 13 Q.B.D. 377 at p. 382 *et seq.*; *Jenks v. Turpin* (1884), 13 Q.B.D. 505.

*Johnston*, in reply. If sec. 204 does not apply to sec. 197 a person who did a legal act might be punished under sec. 197.

May 8. ARMOUR, C.J.O. :—The conviction is in my opinion valid and should be affirmed.

There is nothing in the Criminal Code which, under any circumstance of time or place, exempts from liability the keeper of a common betting house.

The law prohibits the keeping of a common betting house on the race-course of an incorporated association, just as much as it prohibits the keeping of it elsewhere, and prohibits the keeping of it there, just as much during the actual progress of a race meeting as at any other time.

And there is nothing in sec. 204 of the Criminal Code which warrants an implication that a common betting house

may be kept on the race-course of an incorporated association during the actual progress of a race meeting: see *Walsh v. Trebilcock*, 23 S.C.R. 695.

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OSLER, J.A.:—Case stated by the police magistrate at Windsor, under sec. 744 of the Criminal Code, 1892. The defendant was tried on the 10th May, 1901, upon an information laid before the police magistrate, charging that he did on the 6th May, 1901, unlawfully keep a disorderly house, that is to say, a common betting house, contrary to the form of the statute in such case made and provided, and he was found guilty and convicted of the said offence.

The convicting magistrate reported that it was shewn before him, that at the time and place stated in the information, a house was kept and used for the purpose of betting between persons resorting thereto and the keeper thereof, and that the said Edward Hanrahan appeared to be the person having the management of the said house, and he found him to be the keeper thereof.

That the house was owned by a joint stock company called "The Essex Racing and Athletic Club," of which the said Edward Hanrahan was president, and was situate on the race track of the Windsor Driving Park, a duly incorporated association.

That on the date stated in the information, there were between 150 and 200 people at the said betting house, and about 30 of them were betting with the said Edward Hanrahan and his assistants, some upon horse races, then in progress at Morris Park in the State of New York, with which there was telegraph communication, and others upon horse races, then in progress on the said local race track, which latter races were being conducted by the Essex Racing and Athletic Club under agreement with the said association.

The magistrate further reported, that on the above facts he convicted the said Edward Hanrahan under secs. 197 and 198 of the Criminal Code, 1892, and the conviction having been questioned, on the ground, that it was erroneous in point of law, he submitted to the Court of Appeal the question, whether upon the facts so found the conviction was right. If the Court was

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of opinion that the conviction was erroneous in point of law the same was to be quashed, otherwise to stand.

The case comes before us under secs. 743 and 744 of the Code, leave to appeal having been granted, and a case stated for the opinion of the Court, as if the question had been reserved by the magistrate. The facts have been found by him, and we have only to determine whether or not, upon the facts so found, the conviction is erroneous in point of law.

The offence charged is one which may be tried summarily before a police magistrate under secs. 782, 783 (*f*) of the Code.

Section 198 of the Criminal Code, 1892, enacts that: "Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any . . . common betting house," as defined by sec. 197, and—(sub-sec. 2)—that "anyone who appears, acts, or behaves as the person having the care, government or management, of any disorderly house . . . shall be liable to be prosecuted and punished as such, although in fact he or she is not the real owner or keeper thereof."

By sec. 197 a common betting house is defined as (*inter alia*) a house, office, room or place (*a*) opened, kept or used for the purpose of betting between persons resorting thereto and

- (i.) the owner, occupier, or keeper thereof;
- (ii.) any person using the same;
- (iii.) any person procured or employed by, or acting for, or on behalf of any such person;
- (iv.) any person having the care or management, or in any manner conducting the business thereof.

It is unnecessary to set forth the other clauses of the section as the defendant is convicted of an infraction of clause (*a*), that is to say, of keeping a disorderly house, *i.e.*, a common betting house.

The only question is whether the magistrate could properly hold upon the facts that the house in question was a common betting house, for if it was, it was a disorderly house and the defendant was properly convicted. The house was owned by a joint stock company, but the defendant was found to be the keeper of the house, and it was found that the house was kept and used at the time and place, charged



in the information, for the purpose of betting between persons resorting thereto and the keeper thereof; and it was also found that there were a number of persons betting with the accused and his assistants, some of them, upon horse races then in progress in Morris Park in the State of New York, and others, upon horse races then in progress upon a local race track, which latter were being conducted by the Essex Racing and Athletic Club.

What is struck at by secs. 197 and 198 is the keeping of a common betting house for any of the purposes mentioned in clauses (a), (b), (c),\* and (d)\* of sec. 197.

The first clause (a) deals with the keeping of such a house for the purpose of betting in any manner, between the persons resorting thereto and the different classes of persons specified in items (i.) (ii.) (iii.) and (iv.) of that clause as owners, keepers, managers, etc., thereof.

The other clauses define other purposes, connected with betting, which, if a house is kept therefor, will also constitute it a common betting house and therefore a disorderly house, but with these we are not concerned, as the conviction does not proceed upon them.

I only note them, in order to emphasize the fact that the offence dealt with by the whole section is the *keeping* of a house, office, room or other place *for the proscribed purposes*. This being so, the facts found bring the defendant clearly within its danger and he was rightly convicted.

It was strongly urged on his behalf, that he had done nothing, but what is permitted by sub-sec. (2) of sec. 204 of the Act. That section, however, whatever may be its scope, and whether some of the acts forbidden by it might be evidence of an offence under sec. 197 or not, stands by itself. It is enough to say, that the exception contained in sub-sec. (2) is expressly limited to the first part of the section, and there is no ground for reading it into sec. 197.

The conviction must be affirmed.

MACLENNAN, MOSS, and GARROW, J.J.A., concurred.

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\*Added to sec. 197 of the Code by 58 & 59 Vict. ch. 40 (D.).

## [IN THE COURT OF APPEAL.]

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DOVER ET AL. V. DENNE ET AL.

April 12.

*Trusts and Trustees—Liability for Breach of Trust by Co-trustee—"Honestly and Reasonably"—52 Vict. (2) ch. 15, sec. 1 (O.)*

A testator devised his estate to his three executors upon trust. One of the executors was a solicitor, and with regard to him the will provided that in the administration and management of the estate he should be entitled to the same professional remuneration as if he were not trustee. Another executor was in England, and the third, the defendant, was told by the testator that the solicitor-trustee was to have the management of the estate, and consented to act upon that understanding. All three proved the will and acted as trustees, but the whole management of the estate was left to the solicitor, and at his death it was found that he had, without the knowledge of the defendant, misappropriated money of the estate, and that his own estate was insolvent. The testator had perfect confidence in the solicitor, who up to the time of his death was reputed to be a person of integrity, and wealthy:—

*Held*, that the defendant, having acted honestly and reasonably within the meaning of 62 Vict. (2) ch. 15, sec. 1 (O.), was not liable to make good to the estate the loss occasioned by the misconduct of the solicitor.

Decision of Ferguson, J., affirmed.

AN appeal by the plaintiffs from an order of Ferguson, J., dismissing an appeal from the report of the local Master at Peterborough. The facts and arguments are stated in the judgments.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, and LISTER, JJ.A., on the 13th and 14th January, 1902.

*A. B. Aylesworth*, K.C., and *E. B. Edwards*, K.C., for the appellants.

*G. H. Watson*, K.C., and *Louis M. Hayes*, for the defendant Denne, the respondent.

April 12. ARMOUR, C.J.O.:—Stephen Wood died on the 15th January, 1892, having made his will, the material portions of which are as follows:—

"I devise all my estate to Thomas Carruthers, of Reigate, Surrey, England, Henry Denne, of the town of Peterborough, gentleman, and John Burnham, of the same place, solicitor, (hereinafter called the trustees), in trust to realize and convert the same into money, and thereout, in the first place, to pay all

my just debts, funeral and testamentary expenses, and then the residue to invest as they may deem fit, and the annual income to pay to my daughter Annette Dover, free from the control or disposition of her husband, during her natural life, and in trust, after her death, to assign and convey the said trust estate, in equal shares, to the children of my said daughter upon their respectively attaining twenty-five years of age, and in the event of any of the said children dying before becoming entitled to a share as aforesaid, leaving issue, such issue to take the parent's share. Provided, however, if at the death of my daughter any of her children shall not be twenty-five years of age, interest on the share of such a one shall be payable to such child till such age is attained.

"And I hereby appoint the said Thomas Carruthers, Henry Denne, and John Burnham, the executors of this my will.

"And I desire that the said John Burnham in the administration and management of my estate shall be entitled to the same professional remuneration as if he were not such trustee as aforesaid."

Probate of the said will was granted to the said executors on the 12th April, 1892, and on the 12th August, 1892, the executors petitioned the surrogate court, alleging that the estate of the testator at the time of his death was \$15,056.35; that all debts due by the testator at the time of his death and all charges against the estate had been duly paid; and that the residue of the estate was held by them as trustees under the will. And they prayed that their accounts might be examined, audited, and passed, and that a fair and reasonable allowance might be made to them for their care and trouble and their time expended in and about the executorship, and in administering, disposing of, arranging, and settling the affairs of the estate. On this application Burnham and Denne made a joint affidavit verifying their accounts, in which it was stated that the residue of the estate of the testator, amounting to the sum of \$14,950.76, as shewn by statement C., had been transferred to the trustees under the will, subject to the passing of the accounts of the executors.

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Statement C. was as follows:—

July 20—1. Bank Stock Canadian Bank of Commerce.....	\$950.00
And interest up to this date.....	9.23
2. Cash on deposit in C. B. of C. at this date.....	304.80
3. Chattel mortgage from Mrs. Smith and interest to this date.....	208.91
4. Note of Mrs. Smith and interest to this date 6 per cent.....	61.89
5. Total amount of mortgages together with interest accrued to this date..	13,207.50
	<hr/>
	\$14,741.83
6. Amount of cash on hand this date....	8.93
	<hr/>
	\$14,750.76

An order was thereupon, on the 9th September, 1892, made by the surrogate court passing and allowing the accounts, ordering that the sum of \$32 be allowed to the executors for the preparation of the accounts and the costs, charges, and disbursements incidental thereto and to the passing thereof, ordering that the sum of \$250 be allowed to the executors for their care, pains, and trouble in the administration of the estate, as follows, the sum of \$100 each to Denne and Burnham, and the sum of \$50 to Carruthers; and the Court found that the amount in the hands of the executors, after deducting the above allowances at the 20th day of July, for payment to the persons entitled thereto, was \$14,468.76.

The petition, affidavit, and accounts were all drawn up by Burnham, and the said sum of \$14,468.76 was not nor was any part thereof in fact transferred to the trustees under the will, but remained in the possession and under the control of Burnham.

Burnham had been for a number of years the solicitor of the testator, and as solicitor had at the time of the testator's death the custody of the mortgages referred to in statement C., and after his death made out the following list of them:—



Dawson Kennedy.....	\$3000.	C. A.
William Lee.....	3000.	1902
T. J. Welch .....	1000.	DOVER
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M. Clancy .....	1400.	DENNE.
D. Running.....	546.02	Armour,
R. Mowry.....	600.	C.J.O.
Geo. Mann.....	725.	
W. Spence .....	700.	
H. Tucker.....	400.	
B. Hales.....	600.	
W. McGregor.....	76.	
<hr/>		
\$12,517.02		

A copy of this list was at the time given to the plaintiff Annette Dover, and Denne saw the mortgages in Burnham's office, and compared them with the list, looking at the mortgages to see that the names of the mortgagors and the amounts corresponded, and after this, and after the passing of the accounts, the whole business of the estate was left in Burnham's hands, Denne taking no part whatever in it beyond indorsing the cheques at Burnham's request for the dividends from the Bank of Commerce stock, and frequently asking Burnham if there was any change in the mortgages, who always assured him that there was no change in them.

The plaintiff Annette Dover always went to Burnham for her interest, and left some of it with Burnham for investment.

Burnham died on the 29th December, 1897, and it was then discovered that he was a defaulter, and his estate was insolvent. And on the 18th day of January, 1898, the plaintiff Annette Dover was appointed a trustee under the said will in the place of Burnham.

On the 20th January, 1899, this action was brought, praying that an account might be taken of the dealings of Burnham, Denne, and Carruthers with the estate, and of the moneys and securities of the estate, and of the losses in connection therewith, and that the defendants Denne, Carruthers, and Maria M. Burnham, as administratrix of Burnham, might be ordered to account for and make good such losses. At the hearing of the

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cause an order was made that certain accounts and inquiries should be taken and made by the Master at Peterborough, and, amongst them, "an account of the property, moneys, and securities of the estate as the same existed at the time of the death of the testator, and as the same now exists, and of the losses, if any, in connection therewith, and how and when such losses, if any, were occasioned and arose, and in case the said Master shall find that any part of the said estate, real or personal, shall have been lost, an inquiry whether the defendants or any or either of them are liable to account for and make good such losses or any part thereof."

After this action was commenced an agreement was entered into between the plaintiff and the defendants Thomas Carruthers and Annette Wood Carruthers, his wife, by which Carruthers agreed to pay to the plaintiff Annette Dover during her life interest at the rate of five per cent. per annum on the sum of \$2,000, and after her death to pay the like interest upon that sum to his wife during her life, but, if the loss to the estate exceeded the sum of \$8,000, he would pay to the plaintiff Annette Dover during her life, and after her death to his wife, interest at the said rate upon a sum equal to one-fourth of the actual loss, but not exceeding in any event interest upon \$2,250 altogether. And it was further agreed that any sum which should be recovered from Denne up to \$4,000 should be held in trust for the plaintiff Annette Dover during her life and after her death for the plaintiff Violette Mary Dover absolutely. And that any sum which should be recovered from Denne over \$4,000 should be held in trust for the plaintiff Annette Dover during her life and after her death for the defendant Annette Wood Carruthers absolutely; that no costs should be payable by either party to the other; and that the plaintiffs should indemnify Carruthers against any claim that Denne might make against him for contribution, and that the settlement thereby made should be without prejudice to the claims of the plaintiffs or of the defendant Annette Wood Carruthers against the defendant Denne, it being, however, understood that such claim should only be pressed against the defendant Denne to the extent of one-half of the total loss to the said estate.

The Master reported among other things:—

(1) That the real and personal estate of the testator which came to the hands of Denne, Carruthers, and Burnham, as executors and trustees, amounted, after payment of the debts, funeral and testamentary expenses of the testator, and executors' allowance, to the sum of \$14,468.76.

(2) That the said Denne had no actual or personal dealings whatever with the said estate or any part thereof, but that the same and every part thereof was managed and dealt with by Burnham alone, in accordance with the intention of the testator expressed to Denne before he consented to become one of such executors and trustees, and such intention was a condition between the testator and Denne upon which the latter consented to become one of such executors and trustees.

(3) That of the estate there existed mortgage securities in the hands of the plaintiff Annette Dover, Denne, and Carruthers, to the amount of \$7,171.

(4) That of the original estate of the testator the sum of \$6,800 had been lost, part thereof, namely, the sum of \$5,800, in the lifetime of Burnham, and which loss was wholly occasioned by the default, wilful misconduct, and appropriation to his own use thereof on the part of the said Burnham, and without the consent or knowledge in any way of his co-trustee Denne, and the remainder thereof, namely, the sum of \$1,000, since the death of said Burnham in the payment of costs incurred in an action brought by the said Annette Dover, Denne, and Carruthers against one Kennedy at the instance of the plaintiff Annette Dover in an unsuccessful endeavour by litigation to compel said Kennedy to pay and satisfy a mortgage made by him forming part of the said estate, and which he Kennedy had already paid to Burnham in his lifetime.

(6) And he found that the defendant Denne was not liable for or to make good the said loss or any part thereof.

From this report the plaintiffs appealed, and their appeal was heard by Ferguson, J., who dismissed it with costs, and from his judgment this appeal is brought.

The amounts involved in this appeal, and in respect of which Denne is sought to be made liable, are the following:—

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1. Amount of mortgage made by one Tucker to the testator, received by Burnham, \$400.

2. Amount of the balance of a mortgage made by one Kennedy to the testator, received by Burnham, \$3,000.

3. Amount of mortgage made by one Welch to "John Burnham, trustee," and assigned by Burnham to one Strickland, \$1,000.

4. Amount of mortgage made by one Clancy to one Sarginson, and by Sarginson assigned to one Strickland, \$1,400.

5. Costs incurred in striving to enforce payment of Kennedy mortgage, notwithstanding payment to Burnham, \$1,000.

(1) The Tucker mortgage was made to the testator on the 8th October, 1887, for securing the sum of \$400, payable in 5 years, with interest at 7 per cent., with the option to the mortgagor of paying on account of principal such sums as he might desire. It appears that on the 29th December, 1893, Burnham received \$50 on account of principal, and on 17th March, 1894, Hall & Hayes paid for Tucker the balance due, and took from Burnham an undertaking to obtain a discharge of the mortgage within a month, and Burnham procured a discharge to be signed by Carruthers and himself, but Denne was never asked to sign the discharge, nor did he know that the mortgage had been paid. In a book kept by Burnham called "Executors' account book, Stephen Wood's estate," in an account headed "principal account," Burnham on 30th April, 1894, credits \$400 cash in full Tucker's mortgage. This "principal account" shews that on the 27th June, 1893, Burnham lent \$500 to Andrew and Eliz. Fawcett, and the balance at the credit of this account is \$246.03, and this would seem to be all that is chargeable according to this account in respect of the amount of the Tucker mortgage received by him.

(2) The testator on the 1st March, 1887, sold a farm to Dawson Kennedy for \$5,000, receiving \$1,000 in cash and taking a mortgage for \$4,000, payable in ten years, with interest at 6 per cent., payable annually, with the privilege to the mortgagor of paying any sum not less than \$200 at the end of any year, and with a proviso that if the mortgagor should sell any part of the mortgaged lands for an adequate price, the mortgagee would release the land so sold, and upon



being paid the purchase money would apply it in payment of the mortgage.

The transaction was carried out in Burnham's office by Burnham, and when Kennedy produced the \$1,000, the cash payment, the testator told him to give it to Burnham, and that he would give him a receipt for it, and he handed it to Burnham, and he gave him a receipt for it. In the fall of the same year Kennedy sold a part of the mortgaged land to one Welch, and the business was transacted in Burnham's office, and Welch paid the purchase money through Burnham, who applied it on the mortgage, giving Kennedy a receipt for the amount, \$1,000, and making this indorsement on the mortgage: "Oct. 26, 87, By cash on acc. \$1000.00;" (sgd.) "John Burnham." The next winter Kennedy met the testator, who said to him, "Kennedy, why don't you come to see me now?" And he said, "Mr. Wood, I will come up and see you, for I have some money to pay you," and Wood said "Never mind money, we don't want to talk about money. Any money you have to pay, pay to him (Burnham). I have given him all the business, including yours; my head is not as good as it was, and when I want any money I go to Mr. Burnham, and you go to Burnham and don't come to me, and don't bother me about money; when you want to pay any money go to him." On another occasion Kennedy met the testator, and the testator said to him, "Any money you have to pay in reference to this land, you go to John Burnham, and he will do what is right with you." The Christmas before the testator's death the testator sent for Kennedy to come and see him, and in the course of conversation Kennedy said, "I suppose you have made your will." He said, "Oh, yes." Kennedy said, "Who are the executors of the will?" And he said, "John Burnham, Denne, and Carruthers." Kennedy said, "I am well acquainted with Denne and Burnham. I don't know Carruthers." "Well," he said, "you don't bother about any of them but Burnham." Kennedy paid the interest payable in respect of his mortgage to Burnham during the testator's lifetime, and after his death to Burnham, and afterwards conveyed the mortgaged land to his son, subject to the mortgage, who on the 28th June, 1895, paid the principal and interest up to that date to Burnham, who made this

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indorsement on the mortgage: "Rec'd payment in full of the within mortgage and fee for discharge, June 28, 1895;" (sgd) "John Burnham."

The two sums of \$1,000 each paid to Burnham in this transaction were credited to the testator in Burnham's books.

The amount received by Burnham from Kennedy's son was entered in Burnham's daily blotter as follows:—"June 28, 1895, cash from H. P. Kennedy for Dawson Kennedy \$3,061.17, principal \$3,000, interest \$59.17, and \$2 for discharge;" but this sum of \$3,000 was not carried into the "principal account" in his "executors' account book," nor was it posted anywhere in his other books. The interest payable by the mortgage after the testator's death was regularly credited in the "executors' account book," under the heading of "interest account," until the mortgage was paid, and was afterwards until Burnham's death credited annually as if the mortgage were still unpaid. Evidence was given of a conversation said to have taken place between Denne and Burnham in the spring of 1897, when Denne asked Burnham how the interest was coming in, and he said all right, and he asked if Kennedy had been in, and Burnham said "Yes, Dawson Kennedy had been in," and Denne said, "It is a wonder Kennedy does not pay that mortgage off, my son tells me his son is making lots of money." Burnham said, "We can't force him to do it; it is not due yet; if it wasn't due it would be very poor policy to ask him to pay it because the estate is getting six per cent. now, and the chances are he would be wanting five per cent." This mortgage was not due till the 1st March, 1897, and Denne never heard that it had been paid till after Burnham's death. Burnham never procured a discharge of this mortgage for Kennedy, but gave him up the mortgage and the title deeds. After Burnham's death the plaintiff Annette Dover, Denne, and Carruthers brought an action to enforce payment of this mortgage, which was tried by the Chancellor, who dismissed it with costs, and ordered the plaintiffs to execute a discharge of the mortgage.

(3) The Welch mortgage was made on the 31st March, 1890, to John Burnham, trustee, for securing the sum of \$1,000, payable in five years from the 1st April, 1890, with interest at 7 per cent. payable half-yearly. The mortgage money, \$1,000,

was charged to the testator in Burnham's books, from which it would appear that Burnham was trustee of the mortgage for the testator.

Welch had borrowed \$500 from the testator through Burnham, and had given a mortgage dated the 26th October, 1887, and this he paid, by the testator's directions, to Burnham, and it was paid to him on the 6th May, 1889.

Welch never saw the testator at any time respecting the mortgage in question; the business was transacted by Burnham; but he supposed the money was the testator's, and he paid the interest to Burnham; and on the 31st August, 1894, Burnham assigned this mortgage to Ellen Strickland. No interest on this mortgage was credited by Burnham to the testator in his lifetime, but after his death and on the 2nd February, 1893, there was credited by Burnham in the "executors' account book," under the heading "interest account," "By T. J. Welch int. to 1st April, 1893, \$83.11;" and under the heading "principal account," "By T. J. Welch int. to 24th Jan. 1892, \$135.39"—apparently treating the interest due up to the testator's death as principal—and in the same book under the heading "interest account" in 1894, "Jany. 20, By cash from T. J. Welch int. \$70," in 1895, "April 3, By T. J. Welch int. \$70," in 1896, "April 10, By T. J. Welch int. \$60"—an apparent reduction of the interest from 7 per cent. to 6 per cent.; and in 1897, "July 17, By T. J. Welch int. to 1st April, \$60.75."

Welch swore that the testator often told him he had made his will, that he also told him who the executors were, that Denne was one and Burnham another, that Burnham was to act for them as trustee and executor. Q. And did he mention the names of other parties? A. Yes, but not as they had any business to do. Q. What did he say? A. As executors—as figure-heads merely, as men and not as actors. Q. Tell us what he said? A. He had to have these men as executors. He had to have three, but Burnham was the man he depended on to do the business and to look after it. He told me at one time he was to be paid for it. His Honour. Q. Burnham was what? A. Trustee. He was to do the work—do all his business—and Mr. Denne, and Mr. Carruthers was in England, was not in this country, and he and Mr. Denne were figure-heads. It was

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merely after his death so as to serve as executors. Q. That Carruthers was in England? A. Yes, sir. Q. And then? A. Carruthers and Denne. were as figure-heads, as executors, anything I had to do I was to do with Burnham.

(4) The Sarginson mortgage: this was a mortgage made on the 10th June, 1890, by Michael Clancy for securing the sum of \$1,450, payable in six years, with interest at six and one-half per cent., payable annually, with the privilege to the mortgagor of paying in any year of the said term not more than \$200 on account of the principal. This mortgage contained the following indorsement thereon: "June 10th, 1890, Rec'd \$50 on principal" (sgd) "John Burnham." On the 10th June, 1890, the date of this mortgage, there appears the following in Burnham's books under the heading "Thomas Sarginson."

1890, June 10.	By cash for investment 6 per cent.	
	half-yearly . . . . .	\$1500.00
" Aug. 4.	" cash for investment 6 per cent.	
	half-yearly . . . . .	2000.00
" Oct. 28.	" cash for investment 6 per cent.	
	half-yearly . . . . .	700.00
" " 18.	" To lent Michael Burke for you	
	\$2900.	

At this date, 10th June, 1890, according to the testator's account in Burnham's books, there was no money of the testator in Burnham's hands for investment, but on the 11th June, 1891, there appears this entry in the testator's account in Burnham's books, "To lent M. Clancy \$1400;" and he does not credit Sarginson in his books with this amount, nor does it appear that Sarginson ever assigned this mortgage to the testator, nor does there appear to be any entry in any of Burnham's books produced of the receipt of the interest payable by this mortgage for the year from the 10th June, 1890, to the 10th June, 1891.

In the "executors' account book," under the heading "principal account," Burnham credits 1893, "Mar. 4, By M. Clancy int. to 26 Jany. 92, \$35.41." (I am putting the entry as it was originally, for "10 June" has been improperly written over "26 Jany.") And under the heading of "interest account," "By M. Clancy int. to 10 June, 92, \$59.90." He



evidently intended to credit the interest due up to the testator's death under the heading "principal account," but has reversed the amounts. In the same book under the heading "interest account," he credits on the 27th June, 1893, "By M. Clancy int. to 10th June, \$91;" on the 10th June, 1894, "By cash from M. Clancy int. \$91;" and on the 21st June, 1895 "By M. Clancy int. \$91." On the 26th October, 1895, Burnham procured Sarginson to assign this mortgage to Ellen Strickland, and, notwithstanding this, he credits as before on the 16th June, 1896, "By M. Clancy int. \$91."

Sarginson deposed as follows:—Q. You had business dealings with the late John Burnham? A. Yes, sir. Q. Do you know whether he invested any moneys of yours on a mortgage? A. He told me he had some in a mortgage. He told me he had some left. Q. He didn't tell you he had lent \$1400 to a man named Clancy? A. Oh, no. Q. How did you come to sign that mortgage to Mrs. Strickland? A. I signed one document and he said it was Geary's. Q. That is about all you know about it? A. Yes, I could not read very good. Q. You just signed what Mr. Burnham put before you? A. Yes, I lent him the money at three different times. I have three different notes? Q. You don't make any claim in respect of that mortgage of Michael Clancy to you? A. I never thought I had one, the only one I know of was Burke's. Q. Did you get your money back? A. I have got a part. I got two notes. Q. You lent your money on notes to Mr. Burnham? A. Yes. Q. And he was giving you a fixed rate of interest on that? A. 6 per cent. twice a year. Q. That is the way you lent it out to him? A. Yes, he said he would lend it out on mortgage. Q. You were looking to him? A. Oh, yes. I was looking to him. At that time he had my notes.

William Lee deposed that he bought a farm from the testator in 1886, paying \$2,000 down and giving a mortgage for the balance, \$3,000, which was still outstanding, that the business was transacted in Burnham's office, that he laid the \$2,000 on the table, that the testator did not take it, but shoved it across the table to Burnham, saying, "You take that money and if I want any I will come in and get a cheque;" that he asked the testator to whom he would pay the interest

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and any part of the principal, and he said, "Pay this to John Burnham, he always attends to my business, and when I want any money, I will just drop in and get a cheque;" that a year after he met the testator and asked him would he take his interest, and he said, "I don't want you to mention money to me," and was quite vexed, and the witness said that he always paid his interest to Burnham till the latter's death.

The testator's account in Burnham's books produced commenced in April, 1882, and was continued from that time till the testator's death, when it shewed a credit balance in the testator's favour, after crediting all the investments therein charged, of \$189.05, which sum was carried into the "executors' account book" as "cash on hand."

The principal account in "the executors' account book" shews, as I have said above, a balance to the credit of the estate of \$246.03, but this ought to be transposing the entries of the interest received from Clancy, \$270.52; this is assuming the loan of \$500 to Fawcett is properly charged, about which loan there does not appear to have been any evidence given.

The "interest account" in the "executors' account book" is carried down to the 30th June, 1897, and shews a credit balance at that date of \$174.52, and all the interest from the date of the testator's death till the year 1897 appears to have been paid to the plaintiff Annette Dover, Burnham apparently charging her a commission for collecting it.

Evidence was given tending to shew that it was the testator's intention that Burnham should continue to manage the business of his estate after his death just as he had managed it for him in his lifetime, and evidence was given of the circumstances under which Denne consented to become an executor and of the representations made by the testator to him to induce him to become such, from which the learned Master found, and I think properly found, that "the estate and every part thereof was managed and dealt with by Burnham alone in accordance with the intention of the testator expressed to Denne, before he consented to become one of his executors and trustees, and that such intention was a condition between the testator and Denne upon which the latter consented to become one of such executors and trustees."

Evidence was also given of the confidence reposed by the testator in Burnham and of the estimation in which he was held up to the time of his death for honesty and integrity, and that up to that time he was reputed to be wealthy.

The learned Master found in his reasons for his report that Denne acted honestly without a doubt, and, as he thought, reasonably under the circumstances, and that he was not liable to make good the loss to the estate occasioned by the misconduct of Burnham, and the question to be first determined in this appeal is whether this finding of the learned Master can be upheld.

The Act 62 Vict. (2) ch. 15, sec. 1 (O.), is a transcript of sec. 3 of the Imperial Act 59 & 60 Vict. ch. 35, and provides that if in any proceeding affecting trustees or trust property it appears to the court that a trustee is or may be personally liable for any breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, then the court may relieve the trustee either wholly or partly from personal liability for the same.

This Act was passed to afford greater protection to trustees, was made retrospective, and was "meant to be acted upon freely and fairly in the exercise of judicial discretion:" *In re Turner*, [1897] 1 Ch. 536. There is no doubt that the defendant Denne acted honestly, but the question is did he act "reasonably as a trustee:" *In re Grindey*, [1898] 2 Ch. 593. And whether he so acted must be determined in the light of all the surrounding circumstances, not as they would appear in the eyes of lawyers and judges, but as they would appear in the eyes of ordinary prudent business men, and if he acted under such circumstances, as they so appeared, as a majority of ordinary prudent business men would have acted under the like circumstances, he ought, I think, to be held to have acted "reasonably as a trustee."

The evidence shewed that Burnham was held in the highest estimation in the community up to the time of his death for honesty and integrity, and that up to that time he was reputed to be a man of means. It shewed also that the testator had unbounded confidence in him.

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The evidence and an examination of the testator's account in Burnham's books shew that whatever money the testator had to invest was handed over by him to Burnham for investment; that when the interest on the investments was paid it was paid to Burnham; and that when an investment was repaid it was repaid to Burnham, and the testator allowed the money so repaid to remain in Burnham's hands until it was re-invested; and that the testator treated Burnham not merely as his solicitor but as the custodian of his money and as practically his banker.

In *Churchill v. Hobson* (1713), 1 P. Wms. 241, Sir Charles Hobson did in his lifetime place great sums of money in the hands of one Goodwyn, a banker, who, at that time, and for a considerable time afterwards, was a person of very great credit, and was cashier to very many monied persons. Sir Charles dies, and leaves the plaintiff Churchill and Goodwyn executors, after whose death, Goodwyn continuing in the same credit, the plaintiff Churchill paid £500 of the money of his testator Sir Charles into Goodwyn's hands, and several of Sir Charles's debtors, on paying in their debts, did require, that when they paid their money to the executor Goodwyn, his co-executor Churchill should join in the receipt for this money, which accordingly was done. But upon the plaintiff Churchill's joining in the receipt, Goodwyn did, on every such payment, give a note to Churchill, by which it was acknowledged, that though the plaintiff Churchill had joined in the receipt yet it was he, viz., Goodwyn only, who received the money, and the money which Goodwyn thus received, and on payment whereof Churchill joined in the receipt, amounted to £1100, after which Goodwyn broke, and became insolvent. The bill was brought by Churchill, to be discharged of the executorship, and to be indemnified against the bankruptcy of Goodwyn. Lord Chancellor Harcourt granted the relief prayed, and in the course of his judgment said: "Neither do I think the executor Churchill ought to be chargeable for the £500 by him paid to Goodwyn, he having been the cashier with whom the testator in his lifetime chose to intrust his money, and therefore the executor ought not to suffer for having trusted him whom the testator himself in his life trusted, and at his death made one



of his executors." *In re Gasquoine*, [1894] 1 Ch. 470; *Bacon v. Bacon* (1800), 5 Ves. 331.

The evidence shewed that it was undoubtedly the intention of the testator that Burnham should continue to manage the business of his estate after his death just as he had managed it for him in his lifetime, and this intention was communicated by the testator to Denne; and, although this might be no answer to this action (although *Mitchell v. Richey* (1865), 12 Gr. 88, looks that way), yet it is evidence to be taken into account in considering whether Denne acted reasonably as a trustee.

Knowing that this was the testator's intention, the provision of the will that Burnham in the administration and management of his estate should be entitled to the same professional remuneration as if he were not a trustee would naturally indicate to the lay mind of Denne, as he swears it did, that Burnham was to have the administration and management of the testator's estate.

The fact that the testator appointed as one of his executors Carruthers, who resided in England, and who could not therefore take any active part in the administration and management of his estate, confirms the evidence that it was the intention of the testator that Burnham should manage the business of his estate after his death just as he had managed it for him in his lifetime. If Denne had been a lawyer, in looking over the list of mortgages after the testator's death, he would naturally have asked for the assignment of the Clancy mortgage to the testator, and would probably have been content with Burnham's statement that he had it, without requiring its production, and seeing that the Welch mortgage was made to Burnham as trustee, he might have required it and the other mortgages to be transferred to the three trustees, and if he had been a prudent and careful lawyer he would have seen that these precautions were taken, but these were precautions which one would hardly expect an ordinary business man to take, particularly as the testator had indicated in his will that Burnham was to do the professional business of the estate, and these were all mortgages which had been taken in the testator's lifetime and with which he had presumably been satisfied.

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Denne supposed that these mortgages would not be paid without the person paying requiring a discharge, and that his signature would be required to the discharge, but the Tucker mortgage was paid, and the person paying it was content with a discharge of it signed by Burnham and Carruthers, and the fact of its payment was concealed from Denne.

Kennedy paid his mortgage, and was content to take it with a receipt in full indorsed upon it, and Denne never knew of its being paid, and after it was paid was led by Burnham to believe that it was still unpaid.

The assignment of the Welch and Clancy mortgages was of course unknown to Denne, and would have been rendered impossible without his knowledge, had he taken the precaution to have required that they should be transferred to the three trustees.

Denne had no reason to suspect Burnham of any dishonesty; and I am of the opinion that, looking at all the circumstances, Denne acted throughout as a majority of ordinary prudent business men would have done, and that he therefore acted reasonably as a trustee, and ought fairly to be excused for any breach of trust for which he might be held personally liable.

The loss to this estate is an unfortunate one, but it should not be forgotten by the beneficiaries that the author of the benefits given to them by his will was also the author of the loss by his misplaced confidence in Burnham.

Having come to the conclusion at which I have arrived, it becomes unnecessary to determine the extent to which, had I come to a different one, Denne could have been held liable, about which a good deal might be said.

In my opinion, the appeal should be dismissed with costs.

OSLER, J.A.:—I have had an opportunity of reading the judgment of my brother MacLennan, and, with some hesitation, agree in affirming the judgment on the grounds and for the reasons stated therein. The doubt I have felt, and have not entirely succeeded in laying, is whether the defendant can be said to be free from blame in the matter of the Welch and Clancy mortgages. These were not taken to the testator as mortgagee, but stood in other names, one in that of Burnham,

and the other in that of an entire stranger, one Sarginson. Ought not the defendant to have made himself so far familiar with the nature of the assets as to have ascertained this fact and to have required the transfer of these securities into the names of the trustees? It is quite probable that if this had been done the subsequent losses which happened in consequence of Burnham's malversation would or might have been diminished, and there would be less difficulty in giving the defendant the benefit of the recent Act 62 Vict. (2) ch. 15, sec. 1.

Given that the verbal declarations or statements made by the testator to the defendant did not relieve him from the duties which devolved upon him by his acceptance of the trusts reposed in him by the terms of the will, and I agree that they did not—see Williams on Executors, 9th ed., p. 1012; Underhill on Trusts, 4th ed., pp. 572, 573; *Carruthers v. Carruthers*, [1896] A.C. 659—the inclination of my opinion would have been, had it fallen to me as Judge of first instance to dispose of the case, against the defendant to the extent above mentioned. In the disposition of the appeal that would now make no difference, and the case being one of special hardship, I gladly defer to my learned brother's greater familiarity with the subject, and assent to the judgment proposed by the other members of the Court dismissing the appeal.

I refer to *Dix v. Burford* (1854), 19 Beav. 409; *Brumridge v. Brumridge* (1858), 27 Beav. 5; and the recent case of *In re Smith, Smith v. Thompson* (1902), 18 Times L.R. 432, which, as far as it goes, is in favour of granting relief to the defendant under the recent Act.

MACLENNAN, J.A. :—This is an action by two legatees under the will of one Stephen Wood, deceased, against two surviving executors, and the representative of a deceased executor, to recover from them personally a sum of about \$8,000 lost to the estate, by the fraud of the deceased executor, and the negligence of the surviving executors. The action was commenced on the 20th January, 1899, and afterwards on the 29th June a settlement was made between the plaintiffs and the defendant Carruthers, as to his personal liability; and the action pro-

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ceeded to a hearing, when a reference was ordered, on the 27th November, 1899, to the Master at Peterborough, to take the accounts of the estate and to inquire and report upon the personal liability of the executors. The Master reported against the alleged personal liability of the defendant Denne, and his report was upheld on appeal to Mr. Justice Ferguson. This is an appeal from that judgment by the plaintiffs.

Stephen Wood had been a resident of Peterborough for many years, and died on the 26th January, 1892, having made his will on the 25th June, 1889. He appointed three executors and trustees of his estate, who all proved the will. The executors were his solicitor, John Burnham, now deceased, the respondent Denne, who had been an intimate friend, and Thomas Carruthers, the husband of his granddaughter, who resided in England. He gave all his estate to his executors and trustees, upon trust "to realize and convert the same into money, and thereout, in the first place, to pay all my just debts, funeral and testamentary expenses, and then the residue to invest as they may deem fit, and the annual income to pay to my daughter Annette Dover, free from the control or disposition of her husband, during her natural life, and in trust, after her death, to assign and convey the said trust estate, in equal shares, to the children of my said daughter, upon their respectively attaining 25 years of age, and in the event of any of the said children dying before becoming entitled to a share as aforesaid, leaving issue, such issue to take the parent's share." He also expressed his desire "that the said John Burnham, in the administration and management of my estate, shall be entitled to the same professional remuneration as if he were not such trustee as aforesaid." The plaintiff Annette Dover is the testator's daughter, and the plaintiff Violette Mary Dover and the defendant Annette Wood Carruthers are her two children.

Having taken probate of the will, the three executors in August, 1892, presented a petition to the Judge of the surrogate court at Peterborough, to pass their accounts. The petition alleged that the estate of the testator, at his death, amounted to \$15,056.35, that all debts and charges against the



estate had been paid, and that the residue was held by them as trustees under the testator's will.

Three accounts were brought into the surrogate court, one an account of the testator's estate at his death, another, an account of receipts and disbursements by the executors, and a third, an account setting forth the nature and particulars of the residue of the estate, amounting to \$14,950.76. These accounts were verified by the affidavits of all the executors, in which it is stated that the residue as shewn by the third account "has been transferred to the trustees, under the said will, subject to the passing of the accounts of the said executors."

By an order dated 9th September, 1892, the learned Judge passed and allowed the accounts; and having deducted \$32 for the preparation of the accounts, and \$250 for the care, pains and trouble of the executors, that is, \$50 for Carruthers, and \$100 each for the other two, he found the amount in the hands of the executors to be the sum of \$14,468.76. That sum, according to the account, consisted of \$13,207.50 in mortgages, with accrued interest, \$950 Bank of Commerce stock, a chattel mortgage for \$200, a small promissory note, and a small sum in cash. The first of the above items consisted of mortgages upon land, but the accounts passed by the Judge contain no specification of borrowers, or dates, or amounts; except that in the account of receipts, there are seven items of interest on mortgages, received from different persons, after the testator's death.

It is admitted that Mr. Burnham had been the testator's solicitor for many years, before and until the time of his death, had managed his investments, and collected the interest, and that at the time of his death his securities were in Mr. Burnham's hands. It is also admitted that the testator had great, even extraordinary, confidence in his solicitor, and that until the death of the latter, on the 29th December, 1897, his integrity and solvency were unquestioned.

During the period of a little over five years, between the passing of the accounts and Burnham's death, the respondent Denne never interfered in the business of the estate, never received or paid any money, never signed any receipts or other documents, with the single exception of indorsing the bank dividend cheques; was never consulted by Mr. Burnham; never

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asked to see the accounts, or for any other information, except making frequent general inquiries of Burnham whether there had been any change in the estate, to which he received an assurance that there had not been any.

During the same time the defendant Thomas Carruthers, the third executor, resided in England, taking no part in the business of the estate, which was managed by Burnham alone, who received the interest upon investments and paid it over to the plaintiff Annette Dover, who was entitled to it as tenant for life.

At Burnham's death it was discovered that he had obtained payment of the principal money of four of the mortgages which, at the time of the testator's death, had been part of the estate, and had applied it to his own use; and his estate being insolvent, the money was lost. Those mortgages were the following:—

1. Mortgage, Kennedy to testator, dated 1st March, 1887, for \$4,000, payable in 10 years, with annual interest at 6 per cent., with the privilege of paying not less than \$200 at the end of any one year.

2. Mortgage, Tucker to testator, dated 8th October, 1887, for \$400, payable in five years, with annual interest at seven per cent., with privilege of paying any sum on account of principal money at any time.

3. Mortgage, Welch to John Burnham, dated 31st March, 1890, for \$1,000, payable in five years, with half-yearly interest at 7 per cent.

4. Mortgage, Clancy to one Thomas Sarginson, dated 10th June, 1890, for \$1,400, payable in six years, with interest yearly at  $6\frac{1}{2}$  per cent., with privilege of paying not more than \$200 in any year.

At the death of the testator the Kennedy mortgage had been reduced to \$3,000, so that the whole amount of principal money which had been appropriated by Burnham was \$5,800.

He received payment of the \$3000 on the Kennedy mortgage on the 28th June, 1895, and of the \$400 on the Tucker mortgage on 17th March, 1894. He assigned the Welch mortgage, which stood in his own name, to one Ellen Strickland, for value, on 31st August, 1894, and he procured Sarginson to assign the

Clancy mortgage to Strickland, also for value, on the 26th October, 1895.

The principal defence of the respondent, and that to which the Master has given effect, is, that he consented and was induced to act as an executor at the request of the testator, on the understanding with and an assurance by him that he was to have no responsibility, at all events during the lifetime of Burnham, who was to manage the affairs of the estate after the testator's death as he had done in his lifetime; that the testator wished him to act, so that in the event of Burnham's death there might be some one to represent his estate, until Carruthers should come out from England to do so.

The evidence on this subject is mainly that of the respondent himself. He says the testator asked him to be one of his executors, that he refused on account of his age, then nearly 70; that afterwards the testator told him he had altered his will, and made him one of his executors, to which he answered he would rather not act, but as he had been very kind to him all his life, he could not but accept. The testator then told him he would not have any trouble, and that all he wished him to do was to hold the position until Mr. Carruthers could be got from England; that Mr. Burnham would do all the business, exactly the same as he was doing it for him at that time; that he would attend to it just the same after his death as before. In cross-examination, he admits having said, when giving evidence in another action, that, as he understood, according to the will, Burnham "was left to look after those things, but we were left to go over them with him. Mr. Wood told me himself: he will do it, and get paid for looking after it. But he is executor with you, and you will be executor with him and look over things, but he will do the business." There is also evidence of witnesses that the testator had told them he had appointed the three persons named as his executors, but that Burnham was to do the business, and the others were figure-heads.

The question upon this part of the case is whether the duties of an executor under a will can be limited or qualified by a parol agreement or understanding between the executor and the testator in his lifetime. There is no doubt that can be

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done in and by the will itself. In *Wilkins v. Hogg* (1861), 8 Jur. N.S. 25, Westbury, C., said it was perfectly competent to a testator to define what should be the incidents to the duty of a trustee, as long as he kept within the bounds of law. In that case it was sought to make two of three trustees responsible for money which they had allowed the third to receive and which he had misapplied, and the Court held that they were protected by a very special stipulation contained in the will. That decision seems to shew that the limiting or qualification of the duties of an executor is something that concerns the disposition of the testator's estate after his death, and which can therefore only be done by a will duly made and attested according to law. A man cannot, by mere parol, dispose of his property, to take effect after his death, with the well known exception of *donatio mortis causâ*. Nor can he by parol appoint an executor or administrator, and it seems to follow that no more can he define, limit, or qualify the duties of an executor otherwise than by will.

The case of *Mitchell v. Richey*, 12 Gr. 88, was cited to us as an authority in favour of the opposite view. In that case one Richey by deed conveyed certain houses to trustees upon trust for himself for life, and for certain other persons in remainder in fee. Afterwards the settlor voluntarily released his life interest for the benefit of the persons in remainder, and at the same time new trustees were appointed in place of two who had died, upon which occasion it was agreed by all parties, and was one of the conditions on which the release was executed, that one of the new trustees should collect and apply the rents. These rents, or some of them, were afterwards misapplied and lost by the trustee who had been appointed to receive them, and it was held the other trustees were not responsible. This case is quite distinguishable from the present. The original conveyance contained no stipulation as to the collection of the rents, and in such a case the *cestui que trust* is himself entitled to be put in possession or to collect the rents, and it follows that an agreement may be made between the trustee and the *cestui que trust* that a person nominated by the *cestui que trust* should do so, in which case



the trustee would not necessarily be responsible for his acts :  
Lewin on Trusts, 9th ed., p. 824.

The case of a will is very different. The testator makes his will and appoints executors and trustees. Any wishes or intentions of the testator, in his lifetime, not expressed in his will, are of no effect after his death, unless such wishes or intentions have amounted to a gift or trust or other obligation which was legally binding on him at the time of his death. There was nothing, in the present case, binding either on the testator or his executor. The testator might have appointed some other person executor, and the defendant Denne was not bound to take probate. After the testator's death he voluntarily proved the will, knowing its contents, and bound to know the obligations and duties which it involved. At the testator's death the property which had belonged to him passed to other persons entirely free from any merely verbal stipulation between him and the defendant; and those persons became entitled to the performance by the defendant of all the duties which the office which he voluntarily assumed cast upon him. If the testator desired to relieve the respondent from the duties of the office, or some of them, he could have done so in his will. Finding he had not done so, the respondent might have renounced probate.

I am of opinion that the judgment cannot be supported on the ground on which it was rested by the learned Master.

The next question is whether, under the circumstances disclosed in evidence, the respondent ought to be compelled to make good the money of the estate, or any part thereof, which was received and misapplied by his co-executor Burnham. In the case of *Wilkins v. Hogg, supra*, Westbury, C., said: "There were three modes in which a trustee would become liable, according to the ordinary rules of the law—first, where, being the recipient, he hands over money without securing its due application; secondly, where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and, thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress." The present case is not one of either the first or the third kind. The

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respondent did not himself receive any of the money, nor did he become aware of any breach of trust either committed or meditated by Burnham. If he is responsible at all, it is because he allowed Burnham to receive the money which is now lost, without making due inquiry as to his dealings with it.

He admits that at the time of passing the accounts the mortgage securities of the estate were produced to him by Burnham, who had made the investments for the testator, and in whose possession they were. He had them in his hands, and observed the names of the mortgagors, and the amounts. Burnham had made a statement of the particulars of the estate, and the respondent verified it by an examination of the securities; but he did not observe to whom the mortgages were made payable, and that did not appear in the statement. He says that afterwards he often asked Burnham whether there was any change in the mortgages, and received for answer that they were the same as at testator's death.

It is contended that but for the respondent's neglect of duty this money would not have been lost, and the duty which he is alleged to have neglected is the following:—He should have had the securities transferred into the joint names of the three executors at the time when the accounts were passed, inasmuch as at that time the duties of the executors ceased and they became trustees; they should also have notified the several mortgagors of the trusteeship, and should have required them to make payment to all the trustees and not to one, which could easily be done by naming a bank into which the money should be paid. No doubt, if these precautions had been taken, the misappropriation would probably not have occurred. If the respondent had been a very careful lawyer, he might have taken these precautions, although, having regard to Burnham's personal and professional character and standing, even lawyers might have acted just as the respondent did. The securities produced to him were mortgages taken in the testator's lifetime, and presumably with his approval. Although one was in Burnham's name and the other in the name of a third person, Sarginson, this was not observed by the respondent, a layman, with little, if any, experience in such matters, and would not be regarded as of any importance if it had been. The important

circumstance was that they were the testator's own investments. None of them was over due, and all that had to be done was to receive the interest and to pay it to Mrs. Dover. Burnham received the interest and paid it over to the plaintiff, and after he received the principal of the two which were paid off, and after he made away by assignment with the other two, he still continued to pay interest to the plaintiff just as if the mortgages had still been outstanding. The respondent had no reason to suppose that the mortgages or any of them had been paid off. He was told upon inquiring from Burnham that there was no change, and he knew from the plaintiff that she was duly receiving her interest. There could be no stronger case of the absence of circumstances to suggest or excite suspicion of wrong-doing. If, therefore, the respondent is to be held liable as for a breach of trust, it must be upon the application of a cold, relentless rule of equity, which admits of no qualification.

It is said that the executorship was completed when the accounts were passed, inasmuch as the clear residue, after payment of all liabilities, had been ascertained. It does not appear that there had been any advertisement for creditors, and if any such had appeared afterwards the executors would have had duties to perform. They appear, however, to have been satisfied that there were no liabilities remaining unpaid, and such appears to have been the fact, and they expressly say in their petition that all debts and charges have been paid, and that the residue is held by them as trustees under the will. The trust was to realize and convert the estate into money, to invest the residue, and to pay Mrs. Dover the annual income, etc. The greatest part of the estate, however, was already safely invested, and only a small part required conversion and re-investment, as to which no question now arises. It was quite right to retain the safe investments as they were, and that is what was done, and it was proper not to call them in at or after maturity, if the mortgagers were willing to continue them.

I think it must be held that on the passing of the accounts, all debts and charges having been paid and the residue ascertained, the executors became, as they themselves said in their petition, trustees of the testator's estate, and that the liability

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of the respondent must be determined on that footing: *In re Willey*, [1890] W.N. 1; *In re Smith* (1889), 42 Ch. D. 302; *In re Chapman*, [1896] 2 Ch. 763; *Phillipo v. Munnings* (1837), 2 My. & Cr. 309, 314; *Dix v. Burford*, 19 Beav. 409, 412.

Then, regarded as a trustee, was the respondent guilty of such default as to make him liable? There is no question of the honesty of his conduct. He trusted Burnham and had no reason to suspect him, a circumstance considered material in such cases. In *In re Gasquoine*, [1894] 1 Ch. 470, Lindley, L.J., in a case of this kind said (p. 476): "It is urged that the co-executors were guilty of negligence in not looking more closely into James's proceedings. I do not think so. Perhaps if they had suspected him and watched him more closely the loss might have been avoided; but considering that James was a person trusted by the testator and whom they had no reason to suspect, and that the whole of these transactions took place well within a twelvemonth after the testator's death, I do not think that they were guilty of any such negligence as can make them liable for the loss." In the same case Kay, L.J., p. 479, refers to the absence of reason for suspicion as a ground for exempting the co-executors from blame. Of course it cannot be contended that confidence in a co-trustee, or the absence of reason for suspicion, will or ought to excuse the omission of a plain obvious duty; but it appears to me that there was no plain obvious duty omitted or neglected by the respondent. The only change of title in this case, making notice to the debtor's necessary, arose from the death of the testator; no one could lawfully receive payment of the debts after the testator's death but his executors, or one of them. The title remained the same when the executors became trustees. Notice of the trust in such a case is proper, but the propriety of it would never occur to a layman. Having no reason to suspect and every reason to trust Burnham, he would naturally expect him, being a solicitor, and being entitled by the express terms of the will to payment for his services, to see that everything was done which was legally necessary to perfect the title, and it would never occur to him to consult an independent solicitor as to his duties.



In *In re Chapman*, [1896] 2 Ch. 763, 776, Lindley, L.J., said: "Trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere error of judgment." In 2 Williams on Executors, 9th ed., p. 1691, it is said: "The general rule adopted, with respect to the liability of executors and administrators on this head," (that is, for breach of trust), "is founded upon two principles: 1st, That in order not to deter persons from undertaking those offices, the Court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight ground: 2nd, That care must be taken to guard against an abuse of the trust:" citing several well known cases.

The duty of trustees is said to be to use ordinary care and caution, and they must be supposed to possess ordinary care and prudence: *Learoyd v. Whiteley* (1887), 12 App. Cas. 732. Their conduct must be reasonable and honest: *In re Turner*, [1897] 1 Ch. 536. I think the respondent exercised ordinary care and caution, and that his conduct was reasonable as well as honest. The part of the estate now in question having been invested at the time of the death in good mortgages, it was proper to leave them so, as long as the debtors chose to retain the money: Lewin on Trusts, 10th ed., p. 314; *Townley v. Sherborne* (1634), *Brice v. Stokes* (1805), 2 W. & T. L. C., 7th ed., pp. 629, 633, 655; *Orr v. Newton* (1791), 2 Cox 274. The interest being regularly paid to the tenant for life, the respondent had no reason to suppose that they had been paid off or were not still outstanding. It is not an unusual thing for mortgages to remain outstanding for years after they are due, the interest being paid, and the respondent had the best reason to believe that such was the case.

I am therefore of opinion that the respondent is not responsible for the money received and misapplied by Burnham, nor for the mortgage which he improperly assigned.

On the argument before us it was contended that this was a case for the application of the provision of the recent Act 62 Vict. (2) ch. 15, sec. 1, for the relief of the respondent in case it were held that he had committed a breach of trust. That Act was passed on the 1st April, 1899, and after the filing of the statement of defence in this action. The Act is expressly

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made applicable whether the breach of trust occurred before or after its passage. It was held in *In re Stuart*, [1897] 2 Ch. 583, that it might be applied in actions pending at the time of its passage, and I think, if applicable, we ought to apply it here. The Act authorizes the Court to relieve a trustee from personal liability when he has been found liable for a breach of trust when he had acted reasonably and honestly and ought fairly to be excused. I think that, even if it were held that the respondent were guilty of a breach of trust, it ought also to be held that he had acted both honestly and reasonably, and ought fairly to be excused, and, although what passed between him and the testator would be no excuse independently of this statute, I think it very material on the question whether under the circumstances his conduct was reasonable. See *In re Smith, Smith v. Thompson*, 18 Times L.R. 432, the latest reported case on this subject, to which my attention has been called by my brother Osler.

I am of opinion that the appeal should be dismissed.

LISTER, J.A., died while the appeal was under consideration.

T. T. R.

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## [IN THE COURT OF APPEAL.]

## GUNN V. HARPER ET AL.

C. A.

1902

*Judgment—Date of—Amendment—Death of Plaintiff between Argument and Judgment—Administrator ad Litem.*

April 29.  
May 12.

The plaintiff died after the argument of an appeal by him from the judgment of the High Court dismissing his action with costs, but before judgment was given on such appeal. The Court was not informed of the death, and gave judgment dismissing the appeal with costs. The defendants, in ignorance of the death, obtained the issue of the certificate of judgment, which bore date as of the day on which the judgment was pronounced. Upon an application made by the defendants some months later, the Court directed that the certificate should be amended by dating it as of the day of the argument, and by inserting in the body thereof a direction that it be entered as of that day. *Turner v. London and South-Western R. W. Co.* (1874), L.R. 17 Eq. 561, and *Eccroyd v. Coulthard*, [1897] 2 Ch. 554, followed.

The defendants were entitled to have an administrator *ad litem* appointed to represent the plaintiff's estate in order that the costs of the action and appeal might be recovered.

JUDGMENT in this action was given by the Court of Appeal (2 O.L.R. 611) on the 23rd September, 1901, dismissing with costs an appeal by the plaintiff from the judgment of Meredith, C.J.C.P., (30 O.R. 650), whereby the action was dismissed with costs.

The argument in appeal was heard on the 2nd April, 1900, when judgment was reserved.

Between the argument and the judgment the plaintiff died, but the certificate of the judgment was issued, dated on the 23rd September, 1901, as if the plaintiff were still alive.

No letters of administration or letters probate having been issued in Ontario in respect of the estate of the plaintiff, the defendants applied for an order appointing some person to represent his estate as administrator *ad litem* in order that the costs of the action might be taxed and recovered by the defendants.

The application was heard by BOYD, C., in Chambers, on the 28th April, 1902.

*T. D. Delamere*, K.C., for the applicants.

April 29. BOYD, C.:—The plaintiff's action was dismissed on the merits with costs, for which security had been given by

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bond with sureties. The plaintiff died between the time of argument and the giving of judgment, and the application is to appoint an administrator *ad litem* in order that the costs may be recovered from the sureties. The plaintiff died in England, and left no assets in this Province.

The application should be granted, for something is yet to be done in the action, though it is dismissed. The Court is also in possession of the bond of the sureties, and should facilitate recovery thereon by having the action continued so that judgment may be entered and the costs taxed.

There is jurisdiction to grant this relief, notwithstanding dismissal, though I am not sure that it is needed. The Court may direct judgment to be entered as of date of hearing in the name of the plaintiff: *Turner v. London and South-Western R.W. Co.* (1874), L.R. 17 Eq. 561; and Rules 394 and 404.\*

The defendants then applied *ex parte* to the Court of Appeal for a direction or order to amend the certificate of the judgment of the Court.

The application was heard by OSLER, MACLENNAN, and Moss, J.J.A., on the 2nd May, 1902.

*Delamere*, K.C., for the applicants.

May 12. Moss, J.A.:—After the argument of the appeal in this case, but before judgment was pronounced, the plaintiff died. In ignorance of his death, the defendants applied for and obtained the issue of the certificate of judgment, which bore date as of the day on which the judgment was pronounced.

An application is now made on behalf of the defendants for an order amending the certificate by dating it as of the day of

\* 394. An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survives or continues, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*. And whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death.

404. Where a judgment or order has been made for payment of costs and the action or matter would, but for these Rules, have abated, any person interested under the judgment or order may continue the proceedings and thereupon enforce the judgment or order.



the argument and inserting a direction that judgment be entered as of that date, or for an order vacating the certificate and directing the issue of a new one to be dated and entered as of the day of the argument.

It is well settled that the death of a party to an action after hearing or trial does not prevent judgment being delivered, and that it is not necessary to obtain an order to proceed before drawing up or entering the judgment. But, with regard to the proper form in which the judgment should issue and the date it should bear, the text books and forms of precedents afford little, if any, light. In England the practice as to dating does not appear to have been uniform. In some cases the date was of the day of argument, in others of the day of the delivery of the judgment. But, apparently, there was always a direction that entry should be made as of the day of the conclusion of the argument. For instances of both kinds, reference may be made to the notes furnished by the Registrar to Sir Charles Hall, V.-C., in *Turner v. London and South-Western R.W. Co.*, L.R. 17 Eq. 561. In that case, which may be considered as having settled the practice in England, the plaintiff died after argument, and the Vice-Chancellor, having been informed of that fact before delivery of judgment, considered how he should deal with the case, and, after careful investigation and inquiry into the practice, reached the conclusion that he was able to deliver judgment and direct that it should be entered as of the date when the argument was concluded. He stated that the cases which led him to this conclusion were *Collinson v. Lister* (1855), 20 Beav. 355, and *Troup v. Troup* (1868), 16 W.R. 573. In *Collinson v. Lister* the abatement was caused by the death of the plaintiff while the case was standing for judgment, and, as appeared by the Registrar's book, the decree was dated as of the day of the hearing. In *Troup v. Troup* the point for decision was, whether certain persons who had been defendants in a suit which had been dismissed with costs, could prove for such costs against the estate of the plaintiff in that suit. But what was material to the question before Vice-Chancellor Hall was, that it appeared from the statement that the case came before the Lord Chancellor on appeal and was elaborately argued for several days, concluding on the 30th April, 1867, judgment

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being reserved. On the 2nd May, 1867, the plaintiff died. On the 2nd November the Lord Chancellor gave judgment *nunc pro tunc*, so that the order bore date the 30th April. Vice-Chancellor Hall seems to have adopted this manner of dating the judgment as the proper one, and in this he was followed by North, J., in *Ecroyd v. Coulthard*, [1897] 2 Ch. 554. That learned Judge was informed before he gave judgment that one of the defendants had died since the day on which the arguments were concluded, and he directed that the judgment be dated that day.

It may be taken as now settled that where, at the time of giving judgment, the Court is aware that an abatement has occurred since the argument, it may direct the judgment to be dated as of the day when the argument terminated. Consolidated Rule 629 provides that every judgment and order pronounced by the Court or a Judge shall be dated as of the day on which such judgment or order is pronounced, and shall take effect from that date, unless otherwise directed. If the proviso applies to both the dating and taking effect of the judgment—as to which the corresponding English rule is clear—there is no difficulty in giving the direction. But, if confined to the taking effect of the judgment, the Court may pronounce judgment as of the day of the argument, for the reservation of judgment is for the convenience of the Court, and should not be permitted to operate to the préjudice of any of the parties.

In the present case, if the Court had been aware of the death of the plaintiff when giving judgment, it doubtless would have pronounced it, and directed it to be entered, as of the day of the argument.

The certificate of this Court having issued in its present form through ignorance of an existing fact, the Court, in the exercise of its inherent power over its records, may now give the proper directions with regard to its form: *Re Swire, Mellor v. Swire* (1885), 30 Ch. D. 239; *Sherk v. Evans* (1895), 22 A.R. 242; *Rattray v. Young* (1886), Cass. Sup. Ct. Dig. (1875-1893), p. 692. And the proper course is to amend the certificate by dating it as of the day of the argument, and by inserting in

the body thereof a direction that it be entered as of the day of the argument.

The defendants should receive no costs of the application or amendment.

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OSLER and MACLENNAN, JJ.A., concurred.

E. B. B.

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[IN THE COURT OF APPEAL.]

GRAVES V. GORRIE.

C. A.  
1902  
April 12.

*Copyright—Works of Fine Art—25 & 26 Vict. ch. 68 (Imp.).*

The Imperial Act, 25 & 26 Vict. ch. 68, an Act for amending the law relating to copyright in works of Fine Arts, does not extend to Canada. Judgment of a Divisional Court, 1 O.L.R. 309, affirming that of Rose, J., 32 O.R. 266, affirmed.

AN appeal by the plaintiffs from the judgment of a Divisional Court, reported 1 O.L.R. 309, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 22nd and 23rd of May, 1901. The facts and arguments are stated in the report below.

*J. T. Small*, for the appellants.

*J. H. Denton*, for the respondent.

April 12. ARMOUR, C.J.O.:—The copyright which the plaintiffs have obtained under the provisions of the Act, 25 & 26 Vict. ch. 68 (Imp.), is the creation of that Act, and is only entitled to protection over and through the area to which that Act territorially applies.

And the first question raised is as to the territorial application of the Act, which includes within its provisions the provisions of the Act 7 & 8 Vict. ch. 12 (Imp.).

There are no words in the Act expressly extending the area of protection of a copyright granted by it to the colonies.

And it was laid down by Lord Mansfield as long ago as 1769, in *Rex v. Vaughan* (1769); 4 Burr. at p. 2500, that "No

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Act of Parliament made after a colony is planted, is construed to extend to it without express words shewing the intention of the Legislature to be that it should."

If this was a proper rule to be laid down at that time, it was much more proper that it should prevail in 1862, at the time this Act was passed.

In *Routledge v. Low* (1868), L.R. 3 H.L. 100, Lord Cranworth, in discussing that case, which arose under the Act 5 & 6 Vict. ch. 45 (Imp.), said: "The British Parliament in the time of Queen Anne must be taken *primâ facie* to have legislated only for Great Britain, just as the present Parliament must be taken to legislate only for the United Kingdom and not for the colonial dominions of the Crown. It is certainly within the power of Parliament to make laws for every part of Her Majesty's dominions, and this is done in express terms by the 29th section of the Act now in question."

In *Williams v. Davies*, [1891] A.C. 460, it was held that the English Bankruptcy Act of 1869 had the effect of vesting in the trustee in bankruptcy the bankrupt's title to real estate situate in Lagos, but this was by reason of the express words of the Act and the policy of the Legislature in reference to bankruptcy laws, and the Judicial Committee in that case said (p. 466): "If a consideration of the scope and object of a statute leads to the conclusion that the Legislature intended to affect a colony, and the words used are calculated to have that effect, they should be so construed."

In *New Zealand Loan and Mercantile Agency Company v. Morrison*, [1898] A.C. 349, it was held that the Imperial Joint Stock Companies Act, 1870, did not apply to the colonies, and the Judicial Committee in that case said (p. 357): "It is impossible to contend that the Companies Acts, as a whole, extend to the colonies or are intended to bind the colonial Courts. The colonies possess and have exercised the power of legislating on these subjects for themselves, and there is every reason why legislation of the United Kingdom should not unnecessarily be held to extend to the colonies, and thereby overrule, qualify, or add to their own legislation on the same subject." And further: "Nor do their Lordships think that any assistance is to be derived from what has been held with regard to the application of the



Bankruptcy Acts to the colonies. It has been decided that by the express words of the Bankruptcy Acts, all the property real and personal of an English bankrupt in the colonies, as well as in the United Kingdom, is vested in his assignees or trustees. Their title must, therefore, receive recognition in the colonial Courts, from which it has been considered to follow that the bankrupt, being denuded of his property by the English law, is also entitled to plead the discharge given him by the same law."

I do not think that a consideration of the scope and object of the Act leads to the conclusion that the Legislature intended to affect the colonies, and it cannot be said that the words used are calculated to have that effect, nor can it be said that the policy of the Legislature supports such a conclusion.

And a reference to the various Copyright Acts passed by the Legislature shews that whenever the area of protection of a copyright granted by any of the Acts was intended to include the colonies, the intention was manifested by express words.

The original copyright Act, 8 Anne ch. 19, protected the copyright in books granted by that Act throughout Great Britain only. The Act, 41 Geo. III., ch. 107 (Imp.), extended the area of protection throughout the whole of the United Kingdom and the British dominions in Europe; and the Act, 54 Geo. III. ch. 156 (Imp.), extended the area of protection over the whole of the British dominions.

These Acts were repealed by the Act 5 & 6 Vict. ch. 45 (Imp.), which by sec. 29 provided that it should extend to Great Britain and Ireland, and to every part of the British dominions.

The Acts granting copyright in engravings and similar works of art, 8 Geo. II. ch. 13, 7 Geo. III. ch. 38, and 17 Geo. III. ch. 57, did not extend the area of protection beyond Great Britain until the Act 6 & 7 Will. IV. ch. 59 (Imp.), extended the area of protection to Ireland.

The Act granting copyright in sculpture, 38 Geo. III. ch. 7 (Imp.), did not extend the area of protection beyond Great Britain, and the Act 54 Geo. III. ch. 56 (Imp.), did not extend it beyond the United Kingdom.

The Act granting copyright in dramatic literary property, 3 Will. IV. ch. 15 (Imp.), gave protection throughout the

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United Kingdom of Great Britain and Ireland, the Isles of Man, Jersey, and Guernsey; and every part of the British dominions.

The Act granting copyright in lectures, 5 & 6 Will. IV. ch. 65 (Imp.), did not extend the area of protection beyond the United Kingdom.

The preamble to the Act 7 & 8 Vict. ch. 12 (Imp.), shews also the area of protection granted by the different copyright Acts therein referred to.

It was contended that the language of the Act raised a necessary implication that it extended to the colonies, but I think the contrary to be the implication derivable from its language.

The first section of the Act provides that "the author being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right, etc.," and there is obviously nothing in these words which can have the effect of extending the area of protection to the colonies.

Sec. 3 provides that "all copyright under this Act shall be deemed personal or moveable estate" that is within the area of protection, "and shall be assignable at law."

Sec. 5 applies several of the enactments of the Act 5 & 6 Vict. ch. 45 (Imp.), to this Act "in such and the same manner as if such enactments were here expressly enacted in relation thereto," but does not apply to it the enactment of sec. 29 of that Act providing that it should extend "to every part of the British dominions."

The words "unlawfully made" in the sixth section mean made without the consent of the proprietor.

Secs. 7, 8, and 9 clearly shew that the area of protection granted by the Act was not intended to be extended to the colonies.

The provision of sec. 10 is to the same effect.

Sec. 12 provides that "this Act shall be considered as including the provisions of the Act passed in the session of

Parliament held in the seventh and eighth years of Her present Majesty, intituled 'An Act to amend the law relating to international copyright' in the same manner as if such provisions were part of this Act," and the contention of the plaintiffs is that by force of this section and of the International Copyright Acts, 7 & 8 Vict. ch. 12 (Imp.), 15 & 16 Vict. ch. 12 (Imp.), 38 & 39 Vict. ch. 12 (Imp.), 49 & 50 Vict. ch. 33 (Imp.), and the Order-in-Council of the 28th of November, 1887, the area of protection of their copyright was extended to all the British possessions, but I do not think that any such result was thereby intended or effected.

Reliance was placed in support of this contention chiefly upon secs. 8 and 9 of 49 & 50 Vict. ch. 33 (Imp.).

The plaintiffs' drawing was first produced in the United Kingdom and not in any British possession, and I do not see, therefore, how sec. 8 affects the plaintiffs' case.

Authors of some literary and artistic works first produced in the British possessions were entitled to the benefit of the Copyright Acts, and authors of other literary and artistic works first produced in the British possessions were not so entitled, and the object of the eighth section was, as I understand it, to put authors of all literary and artistic works first produced in the British possessions upon the same footing, and entitling the authors of all literary and artistic works first produced in the British possessions to the benefit of the Copyright Acts, but this had not the effect of extending the area of protection granted by the Copyright Acts to the British possessions: *Page v. Townsend* (1832), 5 Sim. 395; *Winslow on Copyright*, p. 92.

And I do not understand by what reasonable construction the application by sec. 9 of the International Copyright Acts "to every British possession as if it were part of the United Kingdom," can have the effect of applying the Copyright Acts "to every British possession as if it were part of the United Kingdom," and of extending the area of protection granted by those Acts "to every part of the British possessions as if it were part of the United Kingdom."

In my opinion, the judgment appealed from is right, and should be affirmed, and the appeal dismissed with costs.

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OSLER, J.A. :—I have attentively considered the able arguments which were addressed to us by counsel for the respective parties. The question at issue turns, as it appears to me, wholly upon the construction of two Acts of the Imperial Parliament, 25 & 26 Vict. ch. 68, and 49 & 50 Vict. ch. 33, and I entirely agree with the manner in which the relative sections of these Acts have been expounded in the judgments of my late brother Rose, and, in the Divisional Court, of my brother Street. I think the plaintiffs have not acquired copyright for their picture in this country by its registration at Stationers' Hall, pursuant to the provisions of the former Act. The appeal should, therefore, be dismissed.

MOSS, J.A. :—I do not deem it necessary to add more than a few words to what has been said in the Courts below and by my learned brothers in this Court.

I am of opinion that the appeal fails for the reasons already given. I paid close attention to the very interesting and able arguments addressed to us, and have since had the opportunity of considering the case with some care, but I have not discovered any ground for reversing the judgment complained of.

I cannot agree that the provisions of the Imperial Act, 25 & 26 Vict. ch. 68, extend *ex proprio vigore* to the Dominion of Canada. Nor can I accede to the argument that by force of subsequent legislation, and the adoption of the Berne Convention, they have been extended so as to give to a British author of a work of art which he has registered at Stationers' Hall under 25 & 26 Vict. ch. 68 (Imp.), the same rights in this Province as he has in Great Britain.

I think the appellants have shewn no right to the intervention of the Court, and that their action was rightly dismissed.

MACLENNAN, J.A., concurred.

LISTER, J.A., died before the delivery of judgment.

*Appeal dismissed.*

R. S. C.



## [IN THE COURT OF APPEAL.]

## FRANKEL V. GRAND TRUNK RAILWAY COMPANY.

C. A.

1902

May 21.

*Practice—Appeal—Supreme Court of Canada—Claim and Counterclaim—  
Leave ex Cautela.*

The plaintiff claimed \$1,500 damages for delay in delivery of iron. The defendants, besides denying the charge of non-delivery in due time, counter-claimed for \$1,223 demurrage. At the trial judgment was given for the plaintiff for \$1000 and the counterclaim was dismissed. Upon appeal to the Court of Appeal the judgment was varied by limiting the damages to the fall in the price of iron during a considerably shorter time than that fixed in the Court below, the amount to be ascertained on a reference. Upon a motion by the defendants to allow a bond given by them as security upon an appeal by them to the Supreme Court of Canada, the plaintiff's counsel stated that the plaintiff's claim on the reference would be less than \$1000 and contended that no appeal lay:—

*Held*, however, that as the plaintiff claimed \$1,500 and was not limited by the judgment of the Court of Appeal to any particular sum, the matter in controversy on the appeal exceeded the sum of \$1000, so that the appeal lay.

*Held*, also, that upon the counterclaim the sum of \$1,223 was involved and that an appeal lay in respect thereof.

The Court of Appeal declined to grant, *ex cautela*, leave to appeal to the Supreme Court of Canada, the case not being one in which leave, if it were necessary, ought to be granted.

MOTION by the defendants for the allowance of a bond filed by them on a proposed appeal by them to the Supreme Court of Canada from the judgment of the Court of Appeal for Ontario, argued before MACLENNAN, J.A., on the 25th of April, 1902.

*H. E. Rose*, for the defendants.

*James Baird*, for the plaintiff.

May 5. MACLENNAN, J.A.:—Mr. Rose, for the defendants, moves for the allowance of security on appeal to the Supreme Court of Canada. Mr. Baird, for the plaintiff, has no objection to the bond, but objects that no appeal lies, by reason of the Act of the Dominion, 60 & 61 Vict. ch. 34, sec. 1, which enacts that no appeal shall lie from any judgment of this Court to the Supreme Court of Canada except in certain cases, unless special leave of this Court or of the Supreme Court is obtained, and which has not been done.

Mr. Baird contends that the case is not within any of the clauses making the appeal competent; while Mr. Rose says it

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is within clauses (c) and (f), inasmuch as the matter in controversy in the appeal exceeds the sum or value of \$1,000, as explained in the latter of these two clauses.\*

The plaintiff claimed \$1,500 damages for delay in delivery of a large quantity of iron carried by the defendants for the plaintiff, the damages being caused by a fall in the price of the iron between the time when it ought to have been delivered and the time of its actual delivery.

The defendants, besides denying the charge of non-delivery in due time, counterclaimed for demurrage for the use of their cars in which the iron was loaded for several months, and for this they claimed \$1,223.

The trial Judge gave judgment for the plaintiff for \$1,000, estimating the damage upon the fall of price between the time when delivery should have been made and the time of actual delivery, and he dismissed the counterclaim.

The defendant appealed to this Court, which allowed the appeal by limiting the damages to the fall in price during a considerably shorter time than that fixed by the trial Judge, to be ascertained upon a reference. The defendants contended in this Court that the judgment dismissing their counterclaim was erroneous, and their appeal was dismissed.

The plaintiff's counsel, on the argument before me, said the plaintiff's claim on the reference would be less than \$1,000, but I think I cannot act upon that statement. His claim in his pleadings was \$1,500, and although the judgment which he recovered was only \$1,000, I am unable to see that he would be limited to that sum upon the reference under the present judgment.

I therefore think that the matter in controversy in this appeal, on the plaintiff's claim, exceeds the sum or value of \$1,000, within clause (c) of the Act.

\* 1. No appeal shall lie to the Supreme Court of Canada from any judgment of the Court of Appeal for Ontario, except in the following cases :—

(c) Where the matter in controversy in the appeal exceeds the sum or value of one thousand dollars exclusive of costs.

(f) Whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, not that recovered, if they are different.

But however that may be, I think it is a sufficient answer to the plaintiff's objection that the defendants' claim upon their counterclaim is the same in their proposed appeal to the Supreme Court as it was at the trial and in the appeal to this Court, namely, the sum of \$1,223, and that being so they are entitled to appeal without leave.

I overrule the objection and allow the bond.

On the 6th of May, 1902, *H. E. Rose*, for the defendants, moved, *ex cautela*, before OSLER, MACLENNAN, and GARROW, J.J.A., for leave to appeal to the Supreme Court of Canada, citing *Jermyn v. Tew* (1898), 28 S.C.R. 497, where, after the decision by a Judge of the Court of Appeal that an appeal lay, and the allowance of security by him, the Supreme Court quashed the appeal.\*

*Shepley*, K.C., for the plaintiff.

May 21. The judgment of the Court was delivered by OSLER, J.A.:—It appears to us, although we cannot express a controlling opinion on the subject, that both on claim and counterclaim the defendants have the right to appeal to the Supreme Court without leave. That being so, and as we are further of opinion that it is not a case in which we would grant leave if leave were necessary, we ought not to make the order applied for. The motion is, therefore, dismissed with costs, without prejudice, so far as we can say so, to the defendants' right to apply direct to the Supreme Court for the leave desired.

\* See also *Young v. Tucker* (1899), 18 P.R. 449; 30 S.C.R. 185.

## [IN THE COURT OF APPEAL.]

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April 12.

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V.

LAKE ERIE AND DETROIT RIVER R.W. CO.

*Patent for Invention—License—Alterations and Improvements—Rights of Licensee.*

The plaintiff granted to the defendants a license under seal to use a patented invention of his, being an automatic air brake, and to manufacture and equip their rolling stock with the same. He, in this action, complained that though his object was that his brake might be advertised by the defendants' user of it in the form in which he had patented it, the defendants were substituting in part a different unpatented mechanical device of their own, and using the brake as thus altered to his detriment; and contended that if the defendants used his invention at all they must use it in accordance with the form described in his patent, and asked for an injunction:—

*Held* (ARMOUR, C.J.O., dissenting), reversing the judgment at the trial, that in the absence of agreement to the contrary, as here, there is nothing to prevent a licensee from making such changes or alterations as he thinks proper in the patented invention.

Judgment of Meredith, C.J., 2 O.L.R. 190, reversed.

THIS was an appeal from the judgment of Meredith, C.J.C.P., reported 2 O.L.R. 190, by which he granted the plaintiffs an injunction, under the circumstances fully appearing in his judgment and in the judgments of this Court, restraining the defendant corporation from further infringing the plaintiff's patent respecting automatic air brakes by using or permitting to be used in connection with their engines, cabs, cars and coaches an altered form of the plaintiff's brake, or any brake which was an imitation of it or an infringement thereon.

The appeal was argued before ARMOUR, C.J.O., and OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on November 12th, 1901.

*W. Cassels*, K.C., and *A. W. Anglin*, for the appellants, contended that by virtue of their agreement they had a right to use the brake they had been using whether it was an infringement of the plaintiff's patent or not; that they were entitled to do what they liked with the patented article, to improve it, change it, or add anything to it; that as a fact what they were using was a mere mechanical equivalent covered by the plaintiff's patent and that the judgment appealed from read into the agreement limitations which were not in it: *Steam Cutter*



*Co. v. Sheldon* (1872), 5 Fish. 477; *Wooster v. Sidenberg* (1875), 2 Ban. & A. 91; *Hamilton v. Kingsbury* (1878), 3 Ban. & A. 346; *Wilson v. Rosseau* (1846), 4 How. 646; *St. Paul Plow Works v. Starling* (1890), 140 U.S. 184.

*J. H. Rodd*, for the respondents, contended that the defendants' license only gave the right to use the machine when taken from the plaintiff; that it was a sort of personal privilege, giving the defendants the right to obtain the machine at the small price mentioned; that a license to use does not give the license to make, even when the patented machine is worn out: *Simonds' Summary of Law of Patents*, pp. 197-9, 227; *American and English Encyclopædia of Law*, 1st ed., vol. 13, *sub voc.* "license," especially at pp. 558, 564; *Guyot v. Thomson* (1894), 11 R.P.C. 541; that under sec. 26 of the Patent Act, R.S.C. ch. 61, an assignment of a patent must be registered or is void as against a subsequent assignee, and therefore the defendants' unregistered license was void as against that of the MacLaughlin Automatic Air Brake Co., who were joined as plaintiffs. They also referred to *Dalgleisk v. Conboy* (1876) 26 C.P. 254; *Wood v. Leadbitter* (1845), 13 M. & W. 838; *McKenzie v. McGlaughlin* (1884), 8 O.R. 111, at p. 115; *Coleman v. Sir W. Foster* (1856), 1 H. & N. 37; *Noxon v. Noxon* (1894), 24 O.R. 401; *Green v. Watson* (1884), 10 A.R. 113, at p. 119.

*Cassels*, in reply, contended that there was no ground on the evidence for any reformation of the agreement; that sec. 26 of the Patent Act did not apply to this case, referring as it did only to an assignment of the patent itself and not to such a license as that in question here, and that, moreover, where there was full notice as here, the statute did not protect. He also referred to *Chaffee v. Boston Belting Co.* (1859), 22 How. 217, at p. 223; *Mitchell v. Hawley* (1872), 16 Wall. 544.

April 12. ARMOUR, C.J.O.:—In my opinion the judgment appealed from is right and should be affirmed.

The plaintiff MacLaughlin, being the inventor, manufacturer, patentee and owner of the Canadian patent, No. 68185 of "The MacLaughlin Automatic Air Brake," and being desirous of exhibiting it on some railway for the purpose of advertizing it, applied to the defendants for that purpose, who assented to

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its being so exhibited on their railway, and thereupon a deed poll was executed by MacLaughlin on September 30th, 1900, by which he granted to the defendants and their successors "the license and right to use the said invention and to equip their rolling stock in whole or in part with the same for and during the term of the said patent." And he thereby declared "that this license shall be deemed to extend to and include any and every renewal or renewals, amendments or substitutions of or for the said patent and all improvements thereon hereafter acquired by me or the proposed company or my or their heirs, executors, administrators or assigns."

This deed was subject to no condition or stipulation whatever on the part of the defendants, and they were at liberty to act upon this license or not as they thought fit, and if they chose to act upon it they were at liberty to desist from doing so whenever they saw fit.

It was found by the learned trial Judge upon sufficient evidence that "the defendants after the agreement made changes in the Westinghouse brakes, with which the cars on the railway were equipped, so as to convert them into brakes constructed according to the MacLaughlin patent"; that "the defendants' mechanical superintendent (one Austin) and a man named Wilson, who, I take it, was an employee of theirs, set about making changes in the manner of constructing the air brake, altering the mode of construction in important respects until they had made what they deemed to be an improved air brake for which they were entitled to obtain letters patent, and, to the knowledge of the defendants, they came to the conclusion to apply for a patent for this air brake of theirs, and to obtain a patent for it if one could be obtained"; that "some of the defendants' cars were to their knowledge equipped with this air brake of Austin and Wilson, and before action the defendants, though applied to by MacLaughlin's solicitors, refused to discontinue the use of them."

In their statement of defence to the action, however, the defendants plead the license granted by the said deed poll and claim that it extended to authorize them to make the changes and alterations made by them in MacLaughlin's air brake, and admitted that such changes and alterations were "covered by

the said patented invention granted to the said MacLaughlin, and are part of the invention claimed by the said MacLaughlin."

The contention of the defendants at the trial and before us was that they had the right, under the license granted by the deed poll, to make any changes or alterations in MacLaughlin's air brake they saw fit, and to use the whole or any part of it separately or in conjunction with any other device or mode of construction which they might choose to adopt.

Their right to do so must, however, depend upon the true construction of the license granted to them by the deed poll executed by MacLaughlin, and I do not think that this deed gave them any such authority.

It certainly did not do so expressly, and it cannot be reasonably inferred that it did so impliedly.

A license to use a specific article does not authorize the licensee to alter the construction of it, nor does the fact that the article is patented give the licensee any greater right.

This license passed no interest in the patent to the defendants, but only the right to use it, and no case was cited to us, and I have been unable to find any case, which goes the length of holding that a mere license to use a patented article confers upon the licensee the right to make, as was done in this case, substantial changes and alterations in its construction.

In *Guyot v. Thomson*, 11 R.P.C. 541, it was set up by the defendant that the plaintiffs had committed breaches of the license by not manufacturing the articles strictly according to the patent, and, as to this, Romer, J., said at p. 550: "The next point I have to consider is, as to the alterations in the patented machines which the plaintiffs made in certain of the machines supplied by them. Now no doubt the plaintiffs, in some of the machines they sold, did depart in certain points from the precise details of the machine as shewn on the defendant's drawings and his specification, but on the evidence as a whole I am satisfied that these alterations were only alterations in matters of detail—in matters not affecting the principle of the invention; and beyond that, as a question of fact, I am satisfied on the evidence that the alterations were improvements—that they were alterations calculated to increase the efficiency of the machine, and that the employment of those alterations, and the advertisement of those

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alterations, were calculated to increase the reputation and enhance the sales of the patented machine. I need scarcely say that on the construction of this license it is clear to my mind that the plaintiffs were entitled to do that. They were not bound by all the details of the drawings and the specification. The wording of the specification shews that, if it could not have been implied even without the precise wording of the specification. I refer to the use of the word "as" in the license. Suppose, for example, that some person wanted one of the patented machines but wanted it adapted to some peculiar circumstances which rendered it impossible to keep strictly to the drawings and specification. Obviously, to my mind, the plaintiffs would have been entitled, paying the royalty, to have supplied the patented machine adapted to the peculiar circumstances of the case. It follows that, in my opinion, the defendant was not entitled to treat the sale of those machines by the plaintiffs with the alterations in them as anything which enabled him to treat the license as at an end, or to attempt to revoke it."

That case was essentially different from this case. The plaintiffs were the exclusive licensees of the patents for the unexpired terms of the patents, and were licensed not only to use and exercise the inventions, but also to manufacture and sell all circulators and feed-water heaters manufactured according to the inventions when and as they should think fit, paying a royalty to the defendant for each machine manufactured and sold. But it is plain from that case that had the alterations, instead of being unimportant as they were, been such substantial alterations as were made in this case, the result would have been different.

The whole object of and the whole consideration for MacLaughlin granting this license to the defendants was, as they well knew, the promising the exhibition in its use upon their railway of his invention, and they knew when they made the alterations in it that they were frustrating this object and depriving him of this consideration.

The merits are altogether with the plaintiffs, and I think the law is so too.



I refer to the following cases which have more or less bearing on the case :—

*Couchman v. Greener* (1884), 1 R.P.C. 197; *Crosthwaite v. Steel* (1889), 6 R.P.C. 190; *Heap v. Hartley* (1889), 6 R.P.C. 495; *Cheetham v. Nuthall* (1893), 10 R.P.C. 321; *La Société Anonyme v. Midland Lighting Co.* (1897), 14 R.P.C. 419; *Basset v. Graydon* (1897), 14 R.P.C. 701; *Silsby v. Trotter* (1878), 29 N.J. Equity 228.

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In my opinion the appeal should be dismissed with costs.

OSLER, J.A. :—The plaintiff, W. G. MacLaughlin, in July, 1900, obtained letters patent for improvements in automatic air brakes. After making a test of its working qualities the defendants thought well of his invention, and permitted him to equip two or three of their cars with it; and subsequently entered into the following agreement with him:—

“Know all men by these presents that I, William Gordon MacLaughlin, of Kansas City, in the State of Missouri, one of the United States of America, manufacturer, patentee and owner of the Canadian patent (No. 68185) of the MacLaughlin Automatic Air Brake, for divers, good and valuable considerations now received by me from the Lake Erie and Detroit River Railway Company,

“Do hereby grant to the said Lake Erie and Detroit River Railway Company, and their successors, the license and right to use the said invention and to equip their rolling stock in whole or in part with the same for and during the term of the said patent.

“And I further agree for the consideration aforesaid, from time to time, as may be required by said railway company, to supply the said railway company and their successors with said air brake and all necessary equipment up to 5,000 sets, and to make and do all repairs to brakes and equipment so supplied at the actual first cost, plus fifteen (15) per cent. upon such cost, to be paid to me by the said railway company. The said railway company also to pay the cost of freight and carriage from or to the manufactory.

“And whereas I am organizing a joint stock company in

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Canada for the purpose of acquiring said patent and manufacturing and selling the said brake,

"Now these presents further witness that I, the said MacLaughlin, covenant, promise and agree with the said railway company that the said proposed company, when incorporated, shall execute and deliver to the railway company a license and agreement sufficient to confirm and assure to the railway company and their successors the rights and privileges hereby given or intended so to be.

"And I hereby declare that this license shall be deemed to extend to and include any and every renewal, or renewals, amendments or substitutions of or for the said patent, and all improvements thereon hereafter acquired by me or the proposed company, or my or their heirs, executors, administrators or assigns.

"In witness whereof I have hereunto set my hand and seal this 14th day of September, A.D. 1900."

This agreement was not registered in the Patent Office.

Subsequently the defendants equipped eight or ten more of their cars with the patent brake, making changes in the Westinghouse brake which they had theretofore been using, so as to convert them as near as possible into brakes on the pattern of the plaintiff's brake.

Later on the defendants' mechanical superintendent, one Austin, with the assistance of one Wilson, also an employee of the defendants, altered the mode of construction of the plaintiff's brake by substituting a different, and as they supposed, an improved mechanical device, for one of the devices employed by the plaintiff; changing the brakes already in use, and equipping more of their cars with the brake in its altered form. It is said that these persons intended to apply for a patent for the supposed improvement, but the plaintiff asserted, and the defendants admitted, as well on their pleadings as at the trial, that the improvement was covered by the plaintiff's patent.

The statement of claim is an extremely confused piece of pleading, but the real cause of action, as developed at the trial, seems to be that, although the object of the agreement as alleged and understood by the plaintiff was that his brake might be advertized by its user on the defendants' road in the form

in which he had patented it, the defendants were injuring his invention by substituting a different mechanical device of their own for one of those employed by him in the construction of the instrument, and using the brake as thus altered, and, as they allege, improved, as being the plaintiff's invention, to his detriment. The plaintiff, in short, contends that if the defendants use his invention at all, they must use it in accordance with the form described in his patent.

The plaintiff also alleges that the alterations and improvements made by the defendants are an infringement of his patent, and claims that they should be restricted from using them in connection therewith.

It was also contended at the trial that by the true agreement between the parties it was not intended that the defendants should have the right to manufacture the patent brakes, but that the plaintiff was to manufacture them, and the defendants were to take them from him as they required them, and it was claimed that the agreement should be reformed in this respect, and also, if necessary, so as to make it clear that the defendants had no right to alter the brakes as they had been doing.

The company, the formation of which was contemplated in the agreement, was duly incorporated, and on the February 19th, 1901, pending the action, the plaintiff MacLaughlin assigned the patent to the company absolutely. Subsequently the company was, with its assent, duly made party to the action.

Notice to the company of its assignor's agreement with the defendants was sufficiently proved, but it was contended that the latter being unregistered was void as against the company under sec. 26 of the Patent Act, R.S.C. c. 61. It was also contended that the assignment to the latter was a revocation or cancellation of the previous license to, or agreement with, the defendants.

The defendants contended that the acts complained of by the plaintiff were within their rights as licensees under the agreement.

By the judgment as entered, the defendants are enjoined and prohibited from injuring the plaintiff's patent, by using, or permitting to be used, in connection with their engines, etc., an

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altered form of the plaintiff's brake, or any brake which is an imitation thereof, or an infringement thereon, etc.

I think nothing turns upon the non-registration of the instrument, on which the defendants rely, as it is not one to which sec. 26 of the Patent Act applies. It is a mere grant or permission—a license—to practise the invention or to use the thing patented for the purpose of the defendants' own business, and confined probably to its use on their own then existing line of railway: *Emigh v. Chicago, etc., R.W. Co.* (1863), 2 Fish. 387. It conveys no interest in the patent, nor any right to make and use and grant to others the right to make and use the invention, either in the whole country or any particular district. The interest of the patentee remains just as extensive as it was before: *Curtis on Patents*, 4th ed., secs. 211, 212; *Green v. Watson*, 10 A.R. 113; *Heap v. Hartley*, 42 Ch.D. 461; *Dalgleish v. Conboy*, 26 C.P. 254, at p. 260.

Whether, having regard to its terms, it is, as a license, revocable at the will of the grantor, or was revoked by the assignment of the patent to the plaintiff company, are questions which do not now arise, because there was no attempt to revoke it before action; and the assignment to the plaintiff company was made after the action was brought. It may, however, be observed that the instrument is one very different in its terms from that which was considered by the Court of Appeal in *Guyot v. Thomson*, 11 Rep. Pat. Cas. 541; and which was held not to be revocable.

The case turns upon the true construction of the agreement, considered in reference to the surrounding circumstances, so far as it is admissible to regard them for that purpose.

I agree with the learned trial Judge, that no sufficient case has been made for the reformation of the agreement. It was settled between the parties after due deliberation, and there is no proof upon which the Court can act, of any agreement between them by which that which is evidenced by the writing can be rectified or reformed.

It may be conceded that in the ordinary case of a license to use an invention, the licensee paying a royalty or other specified consideration therefor, the question of infringement could not arise between the patentee and the licensee, the very term



importing something which is covered by the invention, and included in the principle laid down in the specification. It is part of the patented invention, and, therefore, covered by the license: *Steam Cutter Co. v. Sheldon*, 5 Fish. Pat. Cas. 478, 484. The licensor may stipulate, as he seems to have done in the agreement in question in the case of *Guyot v. Thomson*, *supra*, that the patented article shall be manufactured without alteration; but in the absence of agreement there is nothing, that I am aware of, to prevent the licensee from making such changes or alterations as he thinks proper. If they are within the invention the licensee can derive no advantage therefrom as against the patentee, nor can the latter complain, as he has conferred upon the licensee the privilege of using his invention with all which this implies: *St. Paul Plow Works v. Starling* 140 U.S., 184; *Chaffee v. Boston Belting Co.*, 22 How. 217 223.

The plaintiff could maintain no action in such circumstances against the licensee for an infringement of his patent under sec. 29 of the Patent Act.

The language of James, L.J., in *Adie v. Clark* (1876), 3 Ch. D. 134, at p. 142, and of Cairns, L.C., in *Clark v. Adie* (1877), 2 App. Cas. 423, at p. 426, may also be referred to.

The question, therefore, is whether from the agreement between the parties it can properly be inferred that the defendants are restricted to the use of the article as described in the patent, without the right to vary it or alter it within the limits of the invention.

By the agreement in question the plaintiff MacLaughlin granted to the defendants for "divers good and valuable considerations now received" by him the license and right to use the invention mentioned in his patent, and to equip their rolling stock in whole or in part with the same, during the term of the patent. He also bound himself to supply from time to time, as might be required by the railway company, the air brake and equipments up to 5,000 sets, and to repair the same at the actual cost price, plus 15 per cent. thereon, to be paid to him by the company. Under this agreement the company were not bound to order any brakes from MacLaughlin, and were, as I read it, at liberty to manufacture them themselves. They were, there-

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fore, practically paying him nothing for the license; and it is clear that the main consideration to him for entering into the agreement was, to quote the language of the learned trial Judge, "the benefit which he would derive from his invention being in use on the railway, and the advertisement which his invention would get from that use."

I think it was open to the plaintiff to prove that this was, in fact, the main or real consideration for the license; not being inconsistent with the consideration actually stated: see *Marsh v. Hunt* (1883), 9 A.R. 595; *Velten v. Carmack* (1892), 20 L.R.A. 101 (notes).

The question, however, still remains whether, assuming the consideration to have been set forth in the agreement as fully as I have stated it, and as I think it was open to the plaintiff to prove it, it carries his case any further.

Upon the whole, I am of opinion that it does not. I do not think that we can imply from the language of the agreement in its most extended form a clear stipulation restricting the ordinary legal right of the licensees to make for their own use such changes or alterations in the article covered by the invention which they have been authorized to use as they may think proper, or restricting the use of the invention to the precise form in which the plaintiff has himself given it birth. What they are using is, notwithstanding the alteration—slight or important—the plaintiff's invention, and it is that which they are advertising in that manner.

They say it is an improvement, though they concede it is not one patentable as against the plaintiff, and we may suppose that they would not use the brake in its amended shape if it were not thereby rendered more suitable to the purposes for which they desire to employ it, and for which the inventor intended it to be applied.

I think, therefore, the appeal should be allowed in the usual way.

MACLENNAN, J.A., concurred.

MOSS, J.A.:—This is an appeal by the defendants from the judgment of Meredith, C.J., awarding the plaintiffs an injunction restraining the defendants from infringing the plaintiffs'

patent respecting automatic air brakes by using or permitting to be used in connection with their engines, cars, cabs and coaches an altered form of the plaintiffs' brake, or any brake which is an imitation thereof or an infringement thereon, or from permitting it to be used on the said engines, cars, cabs and coaches. It is not necessary to refer in detail to the pleadings or evidence. In regard to the mode of stating and proving their case, the plaintiffs appear to have been allowed ample latitude. They utterly failed in their attempt to reform the instrument upon which the questions between the parties now turn, and it stands to be considered in the form in which it was executed.

The learned Chief Justice held, and I agree with him, that the grant to the defendants of the license and right to use the plaintiffs' invention and to equip their rolling stock in whole or in part with the same for and during the term of the patent carried with it the right to manufacture the invented article for these purposes. The agreement also gave the defendants the benefit of every amendment or substitution of or for the invention, and all improvements thereon afterwards acquired by the plaintiffs or any of them.

After the granting of the license to the defendants, they put the plaintiffs' brakes into use and converted the Westinghouse brakes, which they had before in use on their railway, into brakes constructed according to the plaintiff MacLaughlin's patent. This was proper according to the understanding of all parties, and the plaintiffs make no complaint with regard to it. What they do complain of is that afterwards the defendants' mechanical superintendent and Wilson, one of their employees, after trial and experiment with a view to improving the efficiency of the invention, adopted some alterations, involving amongst other things the dispensing with one of the byways provided for the actuating fluid, and that the air-brakes supplied by the plaintiff MacLaughlin or some of them were altered so as to conform to the Austin and Wilson's design and mode of construction, and as altered were used by the defendants on their railway, and that others of the defendants' cars were, with their knowledge, equipped with the brake device as altered by Austin and Wilson.

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Upon the findings of the learned Chief Justice, the plaintiffs' claim is brought down to these two matters. And the question is—Do they warrant the relief which has been granted?

The right of a person who has invented an improvement on a patented invention to obtain a patent for such improvement is secured by sec. 9 of the Patent Act, R.S.C. c. 61.

The right to a patent or the obtaining of one for an improvement does not confer the right of vending or using the original invention, any more than does the patent for the original invention confer the right of vending or using the patented improvement.

Neither patentee can use the other's invention without his consent, but a license from the one will enable the other to use both inventions. See *Cochrane v. Deener* (1877), 11 Brodix 288, at p. 337, and *Robertson v. Blake* (1877), *ib.* 266, at p. 284.

Sec. 9 of the Patent Act has been in substance part of the patent law of this Province since 1826, having been copied from sec. 9 of the U.S. Patent Act of 1793: *Ridout on Patents*, p. 83.

In England the Courts upheld to the same extent the right of a person who had invented an improvement on a patented invention. In *Crane v. Price* (1842), 4 M. & G. 580, 1 Webster's P.C. 377, 393, it was expressly affirmed. The plaintiff was the holder of a patent for an improvement in the manufacture of iron, which consisted in the application of anthracite or stove coal combined with a hot air blast. One Neilson had previously obtained a patent for the use of hot air blasts in furnaces. The plaintiff, before obtaining his letters patent, had obtained from Neilson a license to use his hot air blast. The action was for an infringement by defendant of the plaintiff's patent. Amongst other defences, the defendant pleaded the prior patent to Neilson, and alleged that the plaintiff's patent was void, because in point of law no patent could be taken out which included the subject of a patent still running and in force. But the Court of Common Pleas ruled against this contention. Tindal, C.J., said at pp. 608-9: "The new patent, after the expiration of the old one, would be free from every objection; and whilst the former one exists, the new



patent can be legally used by the public, by procuring a license from Neilson or by purchasing the apparatus from him, and the probability of the refusal of a license to any one applying for it is so extremely remote that it cannot enter into consideration as a ground of any legal objection."

In *Lister v. Leather* (1857), 8 E. & B. 1004, Lord Campbell, in delivering the judgment of the Court of Queen's Bench, said (p. 1017): "The second argument was that, if a subsequent patent for a combination includes a part of an invention already protected by patent, it infringes on the property of another, and so is a violation of his right, and ought to be held illegal on account of his interest. The answer is that a patent for an improvement in an invention already the subject of a patent, if confined to the improvement, is not an infringement of the former patent. The use of the improvement with the former invention during the existence of the former patent without license would be an infringement, but with license that also would be lawful as is in constant experience."

It is clear, therefore, that a patentee of an improvement on a former patented invention needs only the consent or license of the first patentee in order to make full use of both inventions to the extent of the consent or license.

And there appears to be nothing to prevent a licensee of a patentee—unless restrained by the terms of the license—from obtaining a patent for an improvement while he is such licensee. In *Crane v. Price* (supra) that appears to have been the case.

If that be so, may not a person licensed to make and use a patented invention make alterations or additions and without patenting them use the whole under his license? If it makes any difference to the patentee it would be to his advantage, for if the alterations or additions were an improvement he could use them with his patented invention and thus get the benefit of them.

The learned Chief Justice has taken this view of the law for he says: "I do not mean to say that a licensee, if his license does not indicate anything to the contrary, may not be at liberty to make such changes as he pleases—to adopt in the manufacture of the patented article or thing the whole or such parts of the licensed invention as he may see fit—in other

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words, that within the limits, if any, assigned by the license he is not in the same position towards the patentee, as far as using his invention is concerned, as if no patent existed and entitled to anything and everything which, if done by another not licensed to do it, would amount to an infringement of the patented rights": 2 O.L.R. 195-6.

In a note to *Crane v. Price* by Mr. Webster, at p. 413 of 1 Webster's Patent Cases, the matter is summed up: "Hence it is obvious that if a person legally acquires by license or purchase title to that which is the subject of letters patent he may use it or improve upon it in whatever manner he pleases, in the same manner as if dealing with property of any other kind."

This statement is adopted with slight variations in language by Mr. Justice Clifford in delivering the judgment of the Supreme Court of the United States in *Chaffee v. Boston Belting Co.*, 22 How. at p. 223.

In the present case the defendants' user of the brakes covered by the plaintiff's patent, even with the alterations or additions made to some of them, is a user of the plaintiff's invention and—but for the license—an infringement of the patent.

But if the defendants have by the license legally acquired title to the subject of the letters patent, then, unless there is something in the license itself restrictive of the right of user, they may lawfully make the use they have been making of the patented invention.

Under sec. 29 of the Patent Act a license to be valid must be in writing. The license in question here is under seal and its terms cannot be varied by parol. Any condition or restriction must appear from the document itself, and it must be read as containing the whole bargain between the parties. There is no express covenant or condition that the defendants will make and use the plaintiff's invention according to the specifications and not otherwise. There is no ambiguity calling for explanatory evidence.

The instrument must no doubt be read in the light of the surrounding circumstances as disclosed by the testimony, but so reading it I am unable to gather from it any restriction upon the ordinary right of the licensees to make use of the invention

by altering, adding to, or improving it in such manner as they may deem advisable.

The inducement to the plaintiff MacLaughlin to grant the license was doubtless the publicity which he expected would be given to his invention. That was the motive, "but motive is not the same thing with consideration."

If the plaintiff MacLaughlin had intended that the usual effect was not to be given to the language of the license he should have guarded against any save a restricted user of the invention.

The authorities establish that a licensee who is liable for royalties cannot escape payment of them by merely adapting an alteration or addition to the patented invention. If he is found to be using the invention either in connection with or in addition to his own production he must continue to pay the royalties while the license continues, but while it is in force the licensor can demand no more, unless the terms of the license forbid the licensee using the patented invention except in its exact form: *La Societé Anonyme v. The Midland Lighting Co.*, 14 R.P.C. 419.

And if the license had made provision for payment of a royalty for the use of the plaintiff's invention undoubtedly it would have been payable for the brakes as altered by Austin and Wilson.

I think the appeal must be allowed.

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## APPENDIX.

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Reported cases from Ontario disposed of by the Supreme Court of Canada since the publication of Volume 2 O.L.R.

BROPHY V. NORTH AMERICAN LIFE INS. CO., 2 O.L.R. 559.  
—Appeal dismissed and cross-appeal allowed; May 5th, 1902.  
32 S.C.R. 261.

CANADIAN RAILWAY ACCIDENT INS. CO. V. McNEVIN, 2 O.L.R. 521.—Appeal dismissed; May 5th, 1902. 32 S.C.R. 194.

ELIZABETHTOWN V. AUGUSTA, 2 O.L.R. 4.—Appeal allowed; March 11th, 1902. 32 S.C.R. 295.

JACKSON V. THE GRAND TRUNK RAILWAY CO., 2 O.L.R. 689.—Appeal dismissed; May 5th, 1902. 32 S.C.R. 245.

LANGLEY V. VAN ALLEN, 3 O.L.R. 5.—Appeal dismissed; May 5th, 1902. 32 S.C.R. 174.



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## **ACTION ON COVENANT.**

*See* MORTGAGE, 3.

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## **ADEMPITION.**

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## **ADMINISTRATOR AD LITEM.**

*Death of Plaintiff between Argument and Judgment—Amendment of date of Judgment.*]—*See* JUDGMENT, 1.

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## **ADMINISTRATION.**

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*See* EXECUTION, 1.

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*See* DISCOVERY, 3.

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## **ALIMONY.**

*Action by Lunatic—Right to Maintain — Summary Judgment—Con. Rule 616.*]—On a motion to the Court of Appeal for leave to appeal from the judgment of the Divisional Court, reported in 2 O.L.R. 541, affirming the decision of Meredith, C.J.C.P., (1) that the plain-

tiff in the action was not entitled to alimony, and (2) that on a motion for summary judgment under Rule 616 he could pronounce judgment dismissing the action, the Court of Appeal were of the opinion that the judgment was right, and leave to appeal was refused. *Hill v. Hill*, 202.

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## **ALLOTMENT.**

*Subscription for Shares — Contemporary Condition — Notice—Liability as Contributor.*]—*See* COMPANY, 3.

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## **AMENDMENT.**

*Date of Judgment—Death of Plaintiff between Argument and Judgment—Administrator ad Litem.*]—*See* JUDGMENT, 1.

*Notice of Motion—Time—Wrong Day of Week.*]—*See* MUNICIPAL CORPORATIONS, 3.

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## **ANNUITANT.**

*See* BANKRUPTCY AND INSOLVENCY, 2.

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## **ANNUITY.**

*See* WILL, 3 — TRUSTS AND TRUSTEES, 1.

## APPEAL.

1. *County Courts — Appeal to Divisional Court — When Authorized — R.S.O. 1897, ch. 55, sec. 51, sub-secs. 1, 2, 3 and 5.*]—Where from a judgment pronounced by a junior Judge in a county court case, tried before him without a jury, an appeal to set aside such judgment and to enter judgment for the defendants, or, in the alternative, a new trial, was made to the senior Judge, and on such appeal the judgment was set aside and judgment entered for the defendants dismissing the action, an appeal lies to the Divisional Court by the unsuccessful party to such appeal, and the fact that a new trial in the alternative was asked for is immaterial.

The sub-secs. of sec. 51 of the County Courts Act, R.S.O. 1897, ch. 55, applicable are sub-secs. 1, 2 and 5, and not sub-sec. 3. *Leishman v. Garland*, 241.

2. *Leave to Appeal—Special Circumstances.*]—In an action which at the trial resolved itself into two branches, (1) The status of some of the parties, and (2) the testamentary capacity of the testator and the validity of the will propounded; the trial Judge dealt with the validity of the will only, and on an appeal, a Divisional Court dealt with the question of status only:—

*Held*, upon an application for leave to appeal to the Court of Appeal that although the applicants had the judgments of two tribunals against them they had

the opinion of but one Court in respect of either branch of the case, and in view of the value of the estate and the important consequences to them, sufficient special circumstances were shewn to entitle them to leave to appeal. *Kidd v. Harris*, 277.

3. *Appeal from Surrogate Court — Court of Appeal — Form of Notice and Bond—Motion to Quash.*]—On a motion to quash an appeal from a surrogate court to a Divisional Court subsequent to the passing of 58 Vict., ch. 13, sec. 45 (O.), which transfers such appeals from the Court of Appeal to a Divisional Court, on the ground that the notice of appeal did not specify the Court to which the appeal was taken and that the bond filed followed the surrogate form “to the Court of Appeal”:—

*Held*, that the intention to appeal expressed in the notice was sufficient, and that the words “the Court of Appeal” in the bond might be read as an equivalent of “the proper appellate tribunal.” *Taylor et al. v. Delaney et al.*, 380.

4. *Right of Appeal by Sureties from Masters’ Certificate.*]—The bond given by a liquidator appointed under the Winding-up Act provided that the certificate of the Master in Ordinary of the amount for which the liquidator was liable should be sufficient evidence of liability as against the sureties and should form a valid and binding charge against them:



*Held*, that the sureties had the right to appeal from the certificates in accordance with the usual practice of the Court *In re The Army and Navy Clothing Company of Toronto (Limited)*, 37.

See ALIMONY. — ASSESSMENT AND TAXES, I. — BAIL. — PRACTICE, 5.

### ARBITRATION AND AWARD.

1. *Submission — Appointment of Sole Arbitrator*—*Arbitration Act, R.S.O. 1897, ch. 62, sec. 8.*]—A submission contained in a policy of insurance provided “that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient:”—

*Held*, MACMAHON, J., dissenting, that the submission was one providing for a reference “to two arbitrators, one to be appointed by each party,” within the meaning of the Arbitration Act, R.S.O. 1897, ch. 62, sec. 8; and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other might appoint a sole arbitrator.

Decision of Street, J., 2 O.L.R. 301, affirmed.

*Re Sturgeon Falls Electric Light and Power Co. and Town*

*of Sturgeon Falls* (1901), 2 O.L.R. 585, overruled. *Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation. Re Faulkner*, 93.

2. *Clerical Error in Award — Motion to Refer Back*—*Railway Act of Canada.*]—Motion for an order referring back to the arbitrators, to enable them to correct a clerical error, an award made under the Dominion Railway Act:—

*Held*, that if the Provincial legislation (R.S.O. 1897, ch. 62) applied, the motion was needless, the arbitrators having power (sec. 9 (c) ) to correct the mistake. If that legislation were not applicable, there was no power, under the Dominion Railway Act or otherwise, to remit the award, nor to correct the error upon this motion. *Re McAlpine and Lake Erie and Detroit River R.W. Co.*, 230.

3. *Valuation of Buildings — Extension of Time for Making Award — Interest.*]—By a lease for years it was provided that the buildings should be valued at the end of the term by three valuers or arbitrators whose award should be made within the six months next preceding 1st November, 1900, and the value paid by the lessor within six months from that date with interest at seven per cent. from such date.

Valuers or arbitrators were duly appointed and possession was given by the lessees on the last day of the term, but the award was not made until about

a year afterwards, the time for making it having been duly extended:—

*Held*, that the lessees were entitled to interest at seven per cent. on the value of the buildings, as ascertained by the award, from 1st November, 1900.

Judgment of MacMahon, J., reversed. *The Toronto General Trusts Corporation v. White*, 519.

### ARBITRATORS.

See PUBLIC SCHOOLS, 1.

### ASSESSMENT AND TAXES.

1. *Equalization of Assessments—Appeal to the County Judge—Limitation of Time within which Judgment is to be Delivered—Directory Enactment—R.S.O. 1897, ch. 224, sec. 88, sub-secs. 1, 7.*—There is nothing in R.S.O. 1897, ch. 224, sec. 88, sub-sec. 1, which gives a township municipality, dissatisfied with the county council's equalization of assessments, the right to appeal to the county Judge, or otherwise as in that section mentioned, necessitating a by-law to authorize such an appeal. A resolution is sufficient.

The provision in sub-sec. 7 of sec. 88, that the judgment of the county Judge on such an appeal shall not be deferred beyond August 1st next after such appeal, is directory and not imperative, and is to be construed as only directing the Judge to pro-

ceed with all reasonable and possible expedition to determine the matter. *In re Township of Nottawasaga and The County of Simcoe*, 169.

2. *Action on Mortgage—Conveyance of Equity of Redemption to Purchaser at Tax Sale—Onus of Proof of Taxes Due—Improvements—63 Vict. ch. 103, sec. 11 (O.).*—In an action for foreclosure of a mortgage of land in Toronto Junction, defendant set up a purchase at a tax sale prior to 1899 and a conveyance of the equity of redemption to him from the mortgagor, but did not prove the regularity of the sale or that taxes were in arrear, and also claimed for improvements as made under a mistake of title:—

*Held*, that the onus of proof that there were taxes in arrear for which land might rightly be sold was upon the person claiming under the sale for taxes and had not been satisfied.

*Stevenson v. Traynor* (1886), 12 O.R. 804, followed.

*Held*, also that sec. 11 of 63 Vict. ch. 103 (O.), "An Act Respecting the Town of Toronto Junction," declaring that all sales of vacant lands for taxes held prior to the year 1899 in the said town were thereby ratified and confirmed, means sales for taxes for which the lands might rightly be sold.

*Held*, lastly, under the circumstances here, that there was no valid claim for improvements, as defendant had simply improved his own land, which he

took subject to the mortgage.  
*Hislop v. Joss; et al.*, 281.

3. *Valuation of Property—Electric Companies—Rails, Poles, and Wires—Wards—Franchise—Going Concern—Integral Part of Whole—1 Edw. VII. ch. 29 (O.)*—The Act 1 Edw. VII. ch. 29, sec. 2 (O.), has made no difference in the mode of valuing for assessment purposes the rails, poles, wires, and other plant of electric companies erected or placed upon the highways of municipalities, which was held to be proper by the decision in *In re Bell Telephone Company Assessment* (1898), 25 A.R. 351; MACLENNAN, J.A., dissenting. *In re Toronto Electric Light Company Assessment [and other Assessments]*, 620.

4. *Survey—Village Lots—Resolutions of Municipal Council—By-law—Cost of Survey*—See SURVEY.

#### ASSIGNMENT.

*Chose in Action—Validity—Notice—Bank Act—Statute of Elizabeth—Execution—Interest in Partnership—Sale.*—See CHOSE IN ACTION.

#### ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKRUPTCY AND INSOLVENCY, 2.

#### ASSIGNMENTS AND PREFERENCES.

See BANKRUPTCY AND INSOLVENCY, 1.

#### BAIL.

*Extradition—Appeal—Single Judge.*—An application to a single Judge of the Court of Appeal to admit to bail a person committed for extradition, pending an appeal to that Court, was refused by him on the grounds, (1) That it did not appear that the applicant was in actual custody, and (2) it was doubtful if a single Judge of such Court had power to make the order, a matter of bail not being regarded as incidental to the appeal, and so capable of being dealt with by a single Judge under sec. 54 of the Judicature Act.

*Quære*, as to the propriety of granting bail in extradition proceedings otherwise than *de die in diem*, pending the hearing of a motion for *habeas corpus* on an appeal. *Re Watts*, 279.

#### BANK.

*Bank Notes paid in a Bank—Property in the Money.*—See EXECUTION, 3.

#### BANK ACT.

See CHOSE IN ACTION.

#### BANKRUPTCY AND INSOLVENCY.

1. *Assignments and preferences—Extension agreement—Secret advantage—Voluntary payment.*—The defendant, whilst entering with other creditors into an extension agreement,

took from the debtor, without the knowledge of the other creditors, notes at short dates for a large portion of his claim in favour of his nominee. These notes the debtor paid at maturity, and shortly afterwards made an assignment for the benefit of his creditors, the general extension payments not having been met:

*Held*, that the payments so made were voluntary payments and that the other parties to the extension agreement, suing in their own names, and in the name of an assignee under an order, could not recover from the defendant the amount of the payments.

Judgment of Boyd, C., 32 O.R. 216, affirmed, ARMOUR, C.J.O., dissenting. *Langley v. Van Allen*, 5.

2. *Assignment for Benefit of Creditors — Annuitant — Right to Rank on Estate — Assignments Act.*—An insolvent made an assignment to the defendant for the benefit of creditors, pursuant to R.S.O. 1897, ch. 147. Previous to the assignment the defendant had covenanted with the plaintiffs to pay to J. R. \$100 per quarter on the first day of each quarter during her natural life:—

*Held*, that the growing payments were in the nature of contingent debts; and that the plaintiffs were not entitled under R.S.O. ch. 147 to rank upon the estate of the insolvent for the present value of such payments.

*Grant v. West* (1896), 23 A.R. 533, and *Mail Printing Co. v.*

*Clarkson* (1898), 25 A.R. 1, followed.

Such claims are not subject to attachment under the garnishee provisions of the English Judicature Act and Rules, as accruing debts.

*In re Cowans' Estate* (1880), 14 Ch.D. 638, has been disapproved in *Webb v. Stenton* (1883), 14 Q.B.D. 518. *Carswell et al. v. Langley*, 261.

3. *Transfer by Insolvent Debtor — Attacking — Time — Division Court Proceeding — Collateral Inquiry — Pressure — Evidence of.*—A garnishee summons was issued from a Division Court on the 22nd January, 1900, wherein the primary creditor claimed from the primary debtor \$200 upon a due bill, and whereby all debts due from an insurance company to the primary debtor were attached. The primary debtor had recovered a judgment against the insurance company on the 7th December, 1899, and had assigned the judgment on the same day to the claimant. No formal notice of the proceedings in the division court or of any contest as to his rights was ever given to the claimant, but he appeared in the proceedings on the 6th July, 1900, and consented to an adjournment of them, and afterwards appeared again before the Judge, when his rights under the assignment were tried, and judgment was given against him setting aside the assignment as an unjust preference:—

*Held*, on appeal, that the trans-



fer to the claimant was not attacked when the summons was issued, nor until the claimant appeared in the proceedings, and, therefore, it was not attacked within sixty days, and its validity could be supported by proof of pressure in procuring it.

*Held*, also, *FALCONBRIDGE*, C.J., dissenting, that, as it appeared from the evidence both of the primary debtor and the claimant, that the latter had asked the former for security shortly before the security was given, and that the security given was that which was promised, there was pressure inducing the giving of the security, and it should be upheld, notwithstanding that the claimant was merely liable for a debt of the primary debtor which it was expected he should pay, as he did, and notwithstanding that he was not present at the time the assignment was made to him, it having been drawn by his solicitor.

*Molsons Bank v. Halter* (1890), 18 S.C.R. 88, and *Stevens v. McArthur* (1891), 19 S.C.R. 446, followed. *Morphy v. Colwell*, 314.

### BETTING.

*Keeping Disorderly or Common Betting House — Race Track of Incorporated Association.*]—See CRIMINAL LAW, 6.

### BOND.

*Form of On Appeal from a Surrogate Court.*]—See APPEAL, 3.

### BUILDING CONTRACT.

*See* CONTRACT, 1.

### BUILDING SOCIETY.

*See* MORTGAGE, 2.

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### BY-LAW.

*Bonus—Promotion of Manufactures—Removal of Industry “Already Established”—Municipal Amendment Act, 1900, sec. 9—Motion to Quash Registered By-Law — Delay.*]—See MUNICIPAL CORPORATIONS, 2.

### CASES.

*Ainsworth v. Wilding*, [1900] 2 Ch. 315, followed.]—See DISCOVERY, 4.

*Appleby v. Myers* (1867), L.R. 2 C.P. 600, followed.]—See CONTRACT, 1.

*Attorneys, In re* (1876), 26 C.P. 495, followed.]—See SOLICITOR, 1.

*Bell Telephone Co. Assessment, In re* (1898), 25 A.R. 351, followed.]—See ASSESSMENT AND TAXES, 3.

*Boss v. Litton* (1832), 5 C. & P. 407, explained and distinguished.]—See WAY, 3.

*Busfield, In re—Whaley v. Busfield*, (1886), 32 Ch. D. 123, followed.]—See LIEN, 4.

*Comber v. Leyland*, [1898] A.C. 524, referred to.]—See WRIT OF SUMMONS, 1.

*Confederation Life Association v. Labatt* (1898), 18 P.R. 266, followed.]—See PARTIES, 2.

*Cowan's Estate, In re* (1880), 14 Ch. D. 638, disapproved (following *Webb v. Stenton* (1883), 11 Q.B.D. 518.)—See BANKRUPTCY AND INSOLVENCY, 2.

*Croft v. King*, [1893] 1 Q.B. 419, followed.]—See PRACTICE, 1.

*Doe d. Bennett v. Turner* (1840), 7 M. & W. 226, and (1842), 9 M. & W. 643, distinguished.]—See LIMITATION OF ACTIONS.

*Eldon v. Haig* (1819), 1 Chit. 11, followed.]—See MUNICIPAL CORPORATIONS, 3.

*Emery v. Webster* (1853), 9 Ex. 242, followed.]—See PLEADING, 1.

*Evans v. Jaffray* (1901), 1 O.L.R. 614, followed.]—See PARTIES, 2.

*Fane v. Fane* (1875), L.R. 20 Eq. 698, applied and followed.]—See LIMITATION OF ACTIONS.

*Ecroyd v. Coulthard*, [1897] 2 Ch. 554, followed.]—See JUDGMENT.

*Fenelon Falls v. Victoria Railway Co.* (1881), 29 Gr. 4, followed.]—See WAY, 2.

*Gardner v. Irvin* (1878), 4 Ex. D. 49, followed.]—See DISCOVERY, 4.

*Geddes and Garde, In re* (1900), 32 O.R. 262, approved.]—See LANDLORD AND TENANT.

*Grant v. West* (1896), 23 A.R. 533, followed.]—See BANKRUPTCY AND INSOLVENCY, 2.

*Harbin v. Masterman*, [1896] 1 Ch. 351, followed.]—See TRUSTS AND TRUSTEES, 1.

*Hodgins v. McNeil* (1862), 9 Gr. 305, approved.]—See MARRIAGE.

*Hoffman v. Crerar* (1897), 17 P.R. 404, commented on.]—See DISCOVERY, 4.

*Kreutziger v. Brox* (1900), 32 O.R. 418, not followed.]—See DIVISION COURTS, 2.

*Livingstone v. Western Ins. Co.* (1869), 16 G.R. 9, followed.]—See INSURANCE.

*Mail Printing Co. v. Clarkson* (1898), 25 A.R. 1, followed.]—See BANKRUPTCY AND INSOLVENCY, 2.

*Mann v. Ward* (1892), 8 Times L.R. 699, not regarded as an authority.]—See MASTER AND SERVANT, 2.

*Manning v. Robinson* (1898), 29 O.R. 483, followed.]—See REVENUE.

*Medland, In re, Eland v. Medland*, (1889), 41 Ch. D. 476, at p. 492, followed.]—See TRUSTS AND TRUSTEES, 1.

*Mitchell v. City of London Assurance Co.* (1888), 15 A.R. 202, followed.]—See INSURANCE.

*Molsons Bank v. Halter* (1890), 18 S.C.R. 88, followed.]—See BANKRUPTCY AND INSOLVENCY, 3.

*Moseley v. The Victoria Rubber Co.* (1896), 55 L.T.N.S. 482, followed.]—See DISCOVERY, 1.

*Murphy, In re* (1894-5), 26 O.R. 163, 23 A.R. 386, followed.]—See EXTRADITION.

*Murray Canal, Re* (1884), 6 O.R. 685, approved.]—See MARRIAGE.

*McCleave, Ex parte* (1900), 35 New Bruns. R. 100, distinguished.]—See MALICIOUS PROCEDURE.

*McSorley v. The Mayor, etc., of the City of St. John* (1881), 6 S.C.R. 531, distinguished.]—See MALICIOUS PROCEDURE.

*Omnium Securities Co. v. Canada Fire and Marine Ins. Co.* (1882), 1 O.R. 494, observed upon.]—See INSURANCE.

*O'Shea v. Wood*, [1891] P. 286, followed.]—See DISCOVERY, 4.

*In re Parry* (1889), 42 Ch. D. 570, followed.]—See TRUSTS AND TRUSTEES, 1.

*Petrie v. Machan* (1897), 28 O.R. 642, followed.]—See DIVISION COURTS, 2.

*Quigley v. Waterloo Manufacturing Co.* (1901), 1 O.L.R. 606, distinguished.]—See PARTIES, 2.

*Regina v. Fox* (1898), 18 P.R. 343, distinguished.]—See PLEADING, 2.

*Regina v. McGregor* (1868), 19 C.P. 69, distinguished.]—See SURVEY.

*In re Scott and County of Peterborough* (1866), 26 U.C.R. 36, followed.]—See SURVEY.

*Smurthwaite v. Hannay*, [1894], A.C. 494, distinguished.]—See PARTIES, 2.

*Stevens v. McArthur* (1891), 19 S.C.R. 446, followed.]—See BANKRUPTCY AND INSOLVENCY, 3.

*Stevenson v. Traynor* (1886), 12 O.R. 804, followed.]—See ASSESSMENT AND TAXES, 2.

*Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls* (1901), 2 O.L.R. 585, overruled.]—See ARBITRATION AND AWARD, 1.

*Summers v. Cook* (1880), 28 Gr. 179, followed.]—See LIEN, 5.

*Tate v. Natural Gas and Oil Co.* (1898), 18 P.R. 82, followed.]—See PARTIES, 2.

*Thompson v. London County Council*, [1899] 1 Q.B. 840, distinguished, 2.]—See PARTIES, 2.

*Toronto, City of, v. Lorsch* (1893), 24 O.R. 227, followed.]—See WAY, 2.

*Turner v. London and South-Western R. W. Co.* (1874) L.R. 17 Eq. 561, followed.]—See JUDGMENT.

*Warwick v. The County of Simcoe* (1900), 36 C.L.J., approved of and followed.]—See MUNICIPAL CORPORATIONS, 1.

*Webb v. Stenton* (1883), 11 Q.B.D. 518, followed.] — See BANKRUPTCY AND INSOLVENCY, 2.

### CAUSE OF ACTION.

*Division Courts—Territorial Jurisdiction—Cause of Action—Flooding Land—Erection of Dam.*]—See DIVISION COURTS, 3.

### CERTIFICATE OF MASTER IN ORDINARY.

See COMPANY, 1.

### CHILD-STEALING.

See EXTRADITION.

### CHOSE IN ACTION.

*Assignment of—Validity—Notice—Bank Act—Statute of Elizabeth—Execution—Interest in Partnership—Sale.*]—Action by husband and wife to set aside an assignment to a bank by the husband's execution debtor of his share or interest in the assets and business of a partnership. The assignment was made in February, 1896, as security for a past due debt exceeding the amount of the assignor's interest in the partnership. The husband recovered judgment against the assignor in May, 1896, in an action brought before the assignment, and placed execution in the sheriff's hands in July, 1896. Under that execution, the sheriff, without making any

actual seizure of the partnership assets, purported to sell and convey to the wife in October, 1896, all the undivided share or interest of the assignor exigible under execution in the partnership assets or business. This action was begun in November, 1898:—

*Held*, that the assignment was not invalid under the Bank Act, nor under the Statute of Elizabeth, there being no evidence that it was made with intent to delay and defraud the husband in his action against the assignor.

Under the law as it stood at the date of the assignment, notice thereof to the assignor's partners was not necessary to its validity.

*Per* ARMOUR, C.J.O.:—Debts are not included in the expression "goods, wares, and merchandise," as used in the Bank Act.

The effect of placing the execution in the sheriff's hands was to bind the goods of the partnership, so that they were liable to be seized, but no seizure of any specific assets having been made, and all the assets of the partnership having been sold, realized, and disposed of, the execution creditor lost any benefit which he might have derived from the seizure of specific assets and the sale thereunder of the undivided interest of the execution debtor therein; and nothing passed to the wife by the sale to her.

Judgment of a Divisional Court, 1 O.L.R. 303, affirmed.



*Rennie et al v. Quebec Bank et al*, 541.

### CHURCH.

*Methodist Church—Power of Trustees—Allotment of Free Seats—Power to Rent Pews—47 Vict. ch. 88 (O.)—47 Vict. ch. 146 (D.).*]—Under the trusts set out in the schedules to the above Acts the trustees of the Methodist Church have no power to allot free seats to particular members of a congregation. They have, however, the power to rent pews at a reasonable rent. *Trustees Methodist Church, Carleton Place, and Young v. Keyes*, 165.

### CLAIM AND COUNTERCLAIM.

See PRACTICE, 5.

### COMPANY.

1. *Winding-up—Liquidator's Bond—Money Received as Assignee—Appeal—Finality of Certificate.*]—1. After the assignee for the benefit of creditors of an incorporated company had sold part of the assets and received the proceeds he was appointed liquidator under the Winding-up Act, and gave security by a bond which recited all the proceedings and orders and was conditioned to be void if the liquidator should duly account for what he should receive or become liable to pay as liquidator :—

*Held*, that the funds and property in the hands of the assignee became vested in him as liquidator upon his appointment as such and that the sureties were responsible for his subsequent misappropriation thereof.

The bond provided that the certificate of the Master in Ordinary of the amount for which the liquidator was liable should be sufficient evidence of liability as against the sureties and should form a valid and binding charge against them :—

*Held*, that the sureties had the right to appeal from the certificate in accordance with the usual practice of the Court.

Judgment of a Divisional Court affirmed. *In re The Army and Navy Clothing Company of Toronto (Limited)*, 37.

2. *Prospectus—Unreasonable Delay—Subscription for Shares—Departure from Prospectus—Res Judicata—R.S.O. 1897, ch. 191, sec. 9.*]—On January 28th, 1899, defendant and others subscribed for shares in a projected hotel company. The prospectus stated that a charter would be applied for forthwith and building commenced as soon as \$40,000 had been subscribed, at an estimated cost of \$45,000, to be ready by the summer season of 1899. After March 29th, 1899, by which time only \$28,700 had been subscribed, no further subscriptions to stock were taken till October 24th, 1899, nor was the company incorporated, nor anything done

towards having the hotel ready by the time mentioned. After October 24th, 1899, however, additional subscriptions were obtained which shortly brought the total subscribed to \$40,150. On November 24th, 1899, the company was incorporated, and about July 1st, 1900, the hotel was completed at a cost however of about \$15,000 over the estimated figure. There was no evidence that the defendant had at any time after October 1st, 1899, agreed to be bound by his subscription or approved of proceeding with the erection of the hotel, or of the cost subsequently incurred in its erection:

*Held*, under the above circumstances, as the undertaking had not been proceeded with within a reasonable time from its inception, defendant could not now be held bound by his subscription to take shares.

*Semble*, that the fact that in an undefended action brought by defendant against the company judgment had been recovered by the defendant, which contained a declaration of the Court that he was not a shareholder, did not in itself afford any defence in this action brought against him to compel him to pay for the shares he had subscribed for.

The change in the law contained in the present Ontario Company's Act, R.S.O. 1897, ch. 191, sec. 9, as to who become shareholders in a company incorporated by letters patent, specially referred to. *Patterson v. Turner et al.*, 373.

3. *Subscription for Shares—Contemporary Condition—Allotment—Notice—Liability as Contributory.*] — *Held*, under the circumstances of this case, where an applicant had agreed to take shares in a company conditional on his receiving certain moneys to pay for them, that he had the right to withdraw his application, as he did, not having received any formal notice of allotment, by informing the company of his inability owing to non-receipt of the moneys, to pay for the shares, and that he was not liable as a contributory. *In re Publishers' Syndicate—Mallory's Case*, 552.

4. *Franchise—"Works, Plant, Appliances and Property"—Purchase by Municipal Corporation of Gas Works—Ten per cent. Addition—R.S.O. 1887, ch. 164, sec. 99.*] — By agreement between the city of Kingston and the company, the former was to have the option of purchasing and acquiring "the works, plant, appliances and property of the company used for light, heat and power purposes" upon giving the company notice as therein provided at a price to be fixed by arbitration under the Municipal Act. The majority of three arbitrators in fixing the value of the works, plant, appliances and property, did not include anything for the earning power or franchise and rights of the company:—

*Held*, that they were right, for by the fair interpretation

and construction of the agreement the word "property" must be limited by the preceding words, the rule of *ejusdem generis* applying:—

*Held*, also, that there being here no expropriation, but a voluntary agreement and submission, the provisions of R.S.O. 1887, ch. 164, sec. 99, as to adding ten per cent. to the amount ascertained by the arbitrators as the value, had no application. *In the Matter of an Arbitration between The Corporation of the City of Kingston and The Kingston Light, Heat, and Power Company*, 637.

### CONSTABLE.

See MALICIOUS PROCEDURE.

### CONSTITUTIONAL LAW.

*Incorporation of Companies—Dominion Objects—Interference with Property and Civil Rights in Province—Telephone Company—Right to Carry Poles and Wires Along and Across Streets—Consent of Municipalities—Dominion and Provincial Acts—Construction—Inconsistent Provisions.*]

1. Under the British North America Act, the power of the Canadian Parliament extends to the granting of charters of incorporation to companies, with Canadian, as distinguished from Provincial, objects, and to declaring the objects of their incorporation; but, except in the case of companies incorporated

for carrying into effect some of the heads mentioned in sec. 91, the mere fact of a Canadian incorporation does not carry with it the right of interfering with property and civil rights in the different Provinces, in any way, no matter how strongly the objects of incorporation may seem to require such interference; and, in order that such companies may entitle themselves to do so, it is necessary that they obtain the authority of Provincial legislation.

2. While the defendants were duly and properly incorporated under their special Act, 43 Vict. ch. 67 (D.), they did not by that Act obtain the power of interfering in any Province with the property or rights of persons or incorporations, and could not do so until authorized by an Act of the Provincial Legislature.

3. The defendants, being desirous of exercising their powers within the Province of Ontario, petitioned the Legislature of that Province to confirm the powers which their Dominion Act of incorporation purported to confer upon them, and especially the power of carrying their poles and wires along, across, and under the streets and highways in the Province, and thereupon the Act 45 Vict. ch. 71 (O.) was passed, authorizing them to exercise within the Province the powers in the Act mentioned. Two months later, upon the defendants' petition, the Act 45 Vict. ch. 95 (D.) was passed, amending their

Act of incorporation in certain particulars, and declaring that the Act of incorporation as amended and the works thereunder authorized were for the general advantage of Canada:—

*Held*, that from this time forward the defendants were subject to the exclusive jurisdiction of the Dominion Parliament, but the Provincial Act was not thereby repealed, as the Dominion Act had not expressly declared that the provisions of the Ontario Act were no longer binding; and the defendants were still entitled to all the rights and subject to all the restrictions contained in the Ontario Act not abrogated by absolutely inconsistent provisions in the Act of incorporation.

4. By the defendants' Dominion Act they were given a general power to erect and maintain their lines upon, under, and across all streets and highways, qualified by the condition that the location of the lines and the opening up of the streets was to be done under the direction of an officer appointed by the municipal council, and in such manner as the council might direct, and that in certain specified cases the consent of the council must first be obtained. By the Provincial Act similar powers were given, with one important qualification, "that in cities, towns, and incorporated villages, the company shall not erect any pole higher than 40 feet above the surface of the street, nor affix

any wire less than 22 feet above the surface of the street, nor carry any such poles or wires along any street without the consent of the municipal council:—"

*Held*, that the effect of this latter provision was to forbid the defendants carrying *any* poles or wires at all along any street without the consent of the council.

5. The Ontario Act, in so far as it was not consistent with the Dominion Act, must not be taken to be repealed by the latter; the Ontario Act should be treated as conferring special rights upon the defendants in regard to their works in that Province, and at the same time subjecting them to the necessity of obtaining the consent of the local municipalities to the use of the streets, while leaving to their Act of incorporation its full operation in other Provinces.

6. Therefore, the defendants had no right to carry any poles or wires (either above or under ground) along any street in the city of Toronto, without first obtaining the consent of the municipal council; but, inasmuch as the Ontario Act does not make their power to carry wires *across* streets dependent upon the consent of the council, they may carry them across the streets, either above or under ground, subject in the latter case to the direction of the council and its engineer or other officer as to the location of the line and the manner in which



the work is to be done, unless such direction shall not be given within one week after notice in writing, and subject to the other provisions of the Act of incorporation. *City of Toronto v. Bell Telephone Co. of Canada*, 465

### CONSTRUCTION.

*Will* — “Including.”] — *See* WILL, 2.

### CONTEMPT OF FOREIGN DIVORCE JUDGMENT.

*See* EXTRADITION.

### CONTRACT.

1. *Building Contract*—*Agreement to do work for a Specific Sum—Destruction of Building before Completion.*]—The defendants, who had taken a contract for the erection of a dwelling house for a fixed sum, accepted the plaintiff's tender to do the plumbing and tin-smithing work for \$500; but before the completion of the plaintiff's contract, though after they had done work up to \$488, the building was destroyed by fire, not happening by the fault of the plaintiffs, defendants, or the owner. The defendants had received two sums of \$1500 on account of their contract, but they denied that any portion of it was for work done by the plaintiffs. In an action by the plaintiffs to recover the \$488, on a *quantum meruit*:—

*Held*, that where, as here, the contract is to do work for a specific sum, there can be no recovery until the work is completed, or unless the failure to do so is caused by the defendant's fault, and this applies as well to original as sub-contracts, and as the plaintiffs admitted the non-completion by suing on a *quantum meruit*, and there was nothing to shew any fault on the defendant's part there could be no recovery.

Judgment of Boyd, C., reversed.

*Appleby v. Myers*, (1867), L.R. 2 C.P. 660, followed. *King et al. v. Low et al.*, 234.

2. *Statute of Frauds—Master and Servant—Employment for an Indefinite Term—Damages—Master and Servant Act, R.S.O. 1897, ch. 157, sec. 5.*]—A sub-contract to employ a person as salesman so long as the employers' contract with third persons might remain in force, that contract being terminable at any time, is not within the 4th sec. of the Statute of Frauds, for the sub-contract may or may not continue for a year.

Such a sub-contract does not come within sec. 5 of the Master and Servant Act, R.S.O. 1897, ch. 157.

The employers' contract came to an end by the voluntary dissolution of their firm:—

*Held*, that this voluntary dissolution operated as a wrongful dismissal of the plaintiff under his sub-contract and that

although the probable duration of the contract and consequently of his sub-contract would have been, apart from the dissolution of partnership, quite uncertain, he was entitled to substantial and not merely nominal damages. *Glenn v. Rudd*, 422.

See WRIT OF SUMMONS, 1, 2.

### COPYRIGHT.

*Works of Fine Art—25 & 26 Vict., ch. 68 (Imp.).*—The Imperial Act, 25 & 26 Vict. ch. 68, an Act for amending the law relating to copyright in works of Fine Arts, does not extend to Canada.

Judgment of a Divisional Court, 1 O.L.R. 309, affirming that of Rose, J., 32 O.R. 266, affirmed. *Graves v. Gorrie*, 697.

### COSTS.

1. *Discovery—Examination of Parties.*—Where an examination is unnecessarily long the costs of it should be entirely disallowed. *Evans v. Jaffray*, 327.

### SECURITY FOR COSTS.

2. *Police Constable Acting in Discharge of Duty—R.S.O. 1887, ch. 89.*—The defendants, police constables, who had a warrant for the arrest of a person charged with an offence, entered the house of the plaintiff for the purpose of executing the warrant, acting, as they claimed, under a *bona fide* belief that the person designated in the

warrant was in the house, and that they were discharging their duty:—

*Held*, that they came within the provisions of R.S.O. 1897, ch. 89, and were entitled to security for costs. *Lewis v. Dalby*, 301.

3. *Residence of Plaintiff out of Ontario—Return—Ordinary Residence—Rules 1198 (b), 1199.*—The plaintiff was a British subject, and was always a resident of Ontario until his second marriage in 1896, since when he had been living and working part of the time in the State of Michigan and part of the time in Ontario; he had no property or means in Ontario; his wife had a home in Michigan, and after his marriage he made that his place of residence so far as possible, and had no other place of residence. When this action was begun in March, 1901, the plaintiff was at his wife's home in Michigan, and his solicitor indorsed that as his place of residence on the writ of summons. In January, 1902, after delivery of statements of claim and defence, the defendants obtained under Rule 1199, on præcipe, an order for security for costs. The plaintiff and his wife had then come to Ontario for the winter and were boarding at an hotel. The plaintiff stated on affidavit that he had come to reside permanently in Ontario:—

*Held*, that the plaintiff actually resided out of Ontario when the præcipe order was

made; but, security not having been given, he might be relieved from that order if he was now actually, and intended to remain, a resident of Ontario. Upon the evidence, however, such was not the case; the plaintiff's place of residence was in Michigan, and was likely so to remain.

*Held*, also, that if the præcipe order were set aside, an order under Rule 1198 (b) for security for costs, on the ground that the plaintiff's ordinary place of residence was at his wife's home in Michigan, would be properly made. *Nesbit v. Galna et al*, 429.

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#### COUNTERCLAIM.

*See* PRACTICE, 2.

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#### COUNTY COURTS.

*See* APPEAL, 1.

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#### COVENANT.

A covenant in the lease of an hotel by the lessee that he will from time to time apply for a license and at the expiration of the lease assign to the lessor the license, if any, then held by him, is not a covenant binding on the assignee of the term as such, being merely personal, and having nothing to do with the land or its tenure. *Walsh v. Walper*, 158.

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#### CREDITORS' RELIEF ACT.

*See* EXECUTION, 1.

#### CRIMINAL LAW.

1. *Theft — Evidence — Answers Tending to Criminate—Claim of Privilege.*—The prisoner, being the manager of a branch store for the sale of goods supplied by the factory of his employers, arranged with the checker of the factory to load certain goods on a waggon going to his branch store without charging them or keeping the usual check on them which his employers' system required, and had the goods delivered to a customer of his branch, the prisoner stating that for certain business reasons beneficial to his employers he had merely postponed the charging of the goods:—

*Held*, that if the judge did not accept the prisoner's explanation, which he was not bound to do, there was evidence upon which he could legally find him guilty of theft as defined by the Criminal Code.

If a witness when called upon to testify does not object to do so upon the ground that his answers may tend to criminate him, they are receivable against him (except in the case provided for by sec. 5 of the Canada Evidence Act. 1893, as amended) in any criminal proceeding against him thereafter, but if he does object he is protected.

Judgment of the county Judge of the county of Wentworth affirmed. *Rex v. Clark*, 176.

2. *Summary Trial—Police Magistrate—Theft—Attempt to Commit — Conviction — War-*

*rant of Commitment—Necessity for.*—A prisoner, charged with picking a woman's pocket and stealing a sum of money from her person, on being brought before a police magistrate elected to be tried summarily, but was convicted merely of an attempt to pick the pocket:—

*Held*, that the defendant was properly convicted, for that the charge was one which might have been tried at the sessions; and therefore, under sec. 785 of the Criminal Code, could with the accused's consent be tried by the police magistrate, who could sentence him to the same punishment as if tried at the sessions; while by sec. 711, where the offence charged is not proved, a conviction can be made for the attempt to commit the offence.

*Per Moss, J.A.*:—The conviction being sustainable under sec. 785, it was unnecessary to decide whether a person charged with theft in a case under sub-sec. (a) of sec. 783, might, upon his consenting to be tried on that charge, be properly convicted of having attempted to commit theft under sub-sec. (b), without the charge therefor being made, or his consent to be tried therefor given.

*Quere*, as to the necessity for a formal commitment.

Decision of Street, J., 2 O.L.R. 483, affirmed. *Rex v. Morgan*, 356.

3. *Attempt to Incite—Perjury—Bail—Recognizance—Criminal Code, secs. 530 and*

*601—Estreat.*—A defendant charged with offering money to a person to swear that certain other persons gave him a sum of money to vote for a candidate at an election, was admitted to bail, the recognizance being taken before one justice of the peace:—

*Held*, that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to give false evidence or particular evidence, regardless of its truth or falsehood, and was a misdemeanour at common law, and that the recognizance was properly taken before one justice, who had power to admit the accused to bail at common law, and that section 601 of the Code did not apply.

The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law. *Rex v. Cole*, 389.

4. *Municipal Elections—Illegal Voting—Indictable Offence—Information—Police Magistrate—Mandamus.*—Voting in more than one ward at a municipal election by general vote, contrary to the provisions of 1 Edw. VII. ch. 26, sec. 9 (O.), is an indictable offence, and mandamus lies to a police magistrate having territorial jurisdiction to compel him to consider and deal with an application for an information



for such an offence. *In re Rex v. Meehan*, 567.

5. *Evidence—Accused Testifying on His Own Behalf—Cross-examination as to Previous Convictions.*—An accused person who, on his trial for an indictable offence, is examined as a witness on his own behalf, may be cross-examined as to previous convictions. *Rex v. D'Aoust*, 653.

6. *Keeping Disorderly or Common Betting House—Race Track of Incorporated Association—Conviction—Code secs. 197 and 204.*—The defendant was tried and convicted by a police magistrate for keeping a disorderly or common betting house.

In a case stated by the magistrate, in which he reported that it was shewn that a house was kept and used for betting between persons resorting thereto and the keeper: that the accused appeared and he found him to be the keeper: that the house was owned by a joint stock company of which the accused was president and was situated on the race track of an incorporated association: that there were about thirty persons betting with the accused and his assistants, some on races then in progress in the State of New York with which there was telegraphic communication, and others on races in progress on the local race track conducted by the company under an agreement with the association:—

*Held*, that the offence was

the keeping of a house for the purposes prescribed by sec. 197 of the Code, and that the facts proved brought the accused within its danger and he was rightly convicted:—

*Held*, also, that sub-sec. 2 of sec. 204 of the Code stands by itself and that the exception contained in it is expressly limited to the first part of that section, and it should not be read into sec. 197. *Rex v. Hanrahan*, 659.

7. *Summary Conviction—Time for Laying Information—Limitation—R.S.O. 1897, ch. 90, sec. 2—Criminal Code sec. 841.*—The Ontario Summary Convictions Act, R.S.O. 1897, ch. 90, sec. 2, has the effect of incorporating sec. 841 of the Criminal Code, and therefore, in the case of an offence punishable on summary conviction, if no time is specially limited for making any complaint or laying any information under the Act or law relating to the particular case, the complaint must be made or the information laid within six months from the time the matter arose. *Rex v. McKinnon*, 508.

## DAMAGES.

*Trespass—Wrongful and Wilful—Mode of Assessment.*—Where, in an action of trespass, the judgment is that the trespass was wrongful and wilful, the assessment of damages must be on the basis of such finding, and not as if the tres-

pass was done innocently or bona fide. *Union Bank of Canada v. Rideau Lumber Company*, 269.

See CONTRACT, 2.—INFANT.

## DEBTS CHARGED ON LANDS.

See VENDOR AND PURCHASER, 3.

## DEED.

1. *Description—Falsa Demonstratio.*—By an indenture of lease lessees were given the right to “a sufficient supply of water for the purpose of propelling a wheel not exceeding forty-four inches in diameter, being the size of the present wheel upon the premises.” The “present wheel” was forty inches in diameter:—

*Held*, that the governing words were “not exceeding forty-four inches in diameter” and that the subsequent words “being the size of the present wheel upon the premises” should be rejected as *falsa demonstratio*.

Judgment of Ferguson, J., reversed, Maclellan, J.A., dissenting. *Brantford Electric and Operating Company v. Brantford Starch Works*, 118.

2. *Privies in Estate—Reservation in Deed—Action not based on Deed set up as Estoppel.*—See ESTOPPEL.

## DEFAMATION.

*Slander—Privilege—Master and Servant.*—A master is not

necessarily liable in damages for slander because in the presence of fellow servants or even of casual bystanders he accuses his servant of theft. Such an accusation is *prima facie* privileged, and to destroy the qualified privilege there must be some evidence of malice, such as want of belief in the accusation, intemperate language, seeking the opportunity to make the accusation publicly, or the like.

Judgment of Boyd, C., reversed. *Gildner v. Busse*, 561.

## DESCRIPTION.

See DEED, 1.

## DIRECTORY ENACTMENT.

See ASSESSMENT AND TAXES, 1.

## DISCONTINUANCE OF ACTION.

See PRACTICE, 2.

## DISCOVERY.

1. *Affidavit on Production—Dual Relationship of Solicitor—Privilege.*—Where it appeared that certain letters had passed between the defendant in an action and his solicitors therein, who had also acted as his real estate agents, and that in his affidavit on production, he had claimed privilege for such letters:—

*Held*, that the plaintiff was entitled to a further affidavit, setting forth and distinguishing

what communications had taken place between him and his solicitors as such, and as real estate agents, in order to claim privilege for the former, as the latter were not privileged. *Moseley v. The Victoria Rubber Co.* (1896) 55 L.T.N.S. 482, followed. *Clergue v. McKay, et al.* 63.

2. *Examination — Appointment—Attendance on—Voluntarily Taking Oath—Refusal to Answer Questions —Liability.*] —A party to an action who had been served merely with an appointment for her examination for discovery, attended before a special examiner, voluntarily submitted herself for examination, and was sworn :—

*Held*, that she was precluded from setting up, as a ground for her refusal to answer questions submitted to her, that she had not been served with a subpoena. *Cooke v. Wilson*, 299.

3. *Affidavit of Documents—Materiality — Examination of Parties—Scope of—Contents of Document — Costs of Lengthy Examination.*] —The plaintiff alleged a contract of partnership between him and the defendant J. for the promotion of a company to purchase certain bicycle plants, and to carry on a bicycle manufacturing business, etc., and that the defendants R. and C. had maliciously caused a breach of the partnership contract ; and the plaintiff claimed a partnership account, and damages for such breach and for conspiracy.

It appeared from the examination for discovery of the defen-

dant R. that he obtained written agreements from various companies, either in his own name, or in the names of himself and the defendant C., or in the names of other persons ; that these agreements, or some of them, were afterwards assigned to a company which was then incorporated (not a party to this action). The plaintiff alleged that these agreements were, in fraud of his rights, substituted, with variations, for certain agreements previously entered into between the same companies and the defendant J., who was alleged to be the plaintiff's partner in the transactions. The plaintiff also alleged that the defendants R. and C. paid \$20,000 to the defendant J. to induce him to act with them, instead of with the plaintiff, in completing the purchase of the agreements ; and it appeared from R.'s examination that he and C. drew a cheque upon their bank account in favour of the defendant J., which was paid :—

*Held*, that the agreements and the cheque and also a certain memorandum prepared by the defendant R. were material to the plaintiff's case, and should be produced or accounted for in the defendants' affidavits on production of documents.

2. That the defendants R. and C. ought not, as a matter of discretion, to be ordered to disclose, upon their examination for discovery, facts which would become material only when plaintiff should have established his right to recover damages.

3. That the plaintiff was entitled to discovery from the defendants R. and C. as to whether they paid money to J.; whether it was their own money or that of other persons, and if the latter, of what persons; and for what it was paid.

4. That the plaintiff was entitled also to discovery as to the amount paid by R. and C. to the M. company for the bicycle branch of their business; it being alleged by the plaintiff that he and J. had obtained an option to purchase it, and that the defendants had substituted a new option therefor.

5. That the plaintiff was entitled to know from C. the nature of the agreements made for the purchase of the properties; if they were in writing, and he had access to them in his capacity of director of the company which was formed, he should inform himself of their contents so as to be able to answer as to them, or should produce copies; but, if he had no right of access, he was not bound to state his mere recollection of them.

*Semble*, that where an examination is unnecessarily long, the costs of it should be entirely disallowed.

Decision of Meredith, C.J., varied. *Evans v. Jaffray*, 327.

4. *Production of Documents—Affidavit—Privilege—Confidential Communications—Solicitor and Client.*—Where an affidavit on production of documents claims privilege for a correspondence between a solicitor

and his client, it must not only state that the correspondence is confidential and of a professional character, but the nature of it must be set forth, without any ambiguity whatever, in order that there may be no doubt as to its being privileged.

Where the solicitors were acting as agents for the sale of the defendant's land in question in this action shortly before the first of the letters for which the defendant claimed privilege was written:—

*Held*, that the defendant in order to protect the correspondence should give some more definite description of it than that it was written "in reference to the matters which are now in question in this action."

*Gardner v. Irvin* (1878), 4 Ex.D. 49, *O'Shea v. Wood*, [1891] P. 286, and *Ainsworth v. Wilding*, [1900] 2 Ch. 315, followed.

*Hoffman v. Crerar* (1897), 17 P.R. 404, commentea on. *Clergue v. McKay et al*, 478.

### DISMISSAL OF ACTION.

*Practice—Undertaking to go to Trial—Default in Giving—Effect of.*—See PRACTICE, 4, 97.

### DISTRIBUTION OF ESTATE.

See WILL, 4, 97.

### DIVISION COURTS.

1. *Motion for Immediate Judgment—Service with Summons—Regularity of—Computation*



of *Time—Holidays*.]—A special summons issued out of a division court was served on the 8th of November, returnable on the 12th of November, and with it was served a notice of motion for immediate judgment, also returnable on the 12th :—

*Held*, that the notice was properly served, for there is nothing in sec. 116 of the Division Courts Act, R.S.O. 1897, ch. 60, which requires that before such notice is given the time for the filing of a dispute notice should have first expired.

Con. Rule 343, whereby holidays are excluded from computation where a period of less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, does not apply to division courts.

Prohibition refused. *Re McKay v. Talbot*, 256.

2. *Jurisdiction—Breach of Undertaking—Amount Ascertained by Signature*.]—Defendant gave two notes for \$75 and \$62 respectively on a form which contained an undertaking to give further security, and in the event of default in giving the security, that the notes might be treated as due.

Plaintiffs demanded further security, and not receiving same, brought an action on the notes before the time mentioned in them for their maturity had expired :—

*Held*, that notwithstanding the plaintiff had to prove a breach of the undertaking to

give security before he could recover on the notes, the division court had jurisdiction to entertain the action.

*Petrie v. Machan* (1897), 28 O.R. 642, followed in preference to *Kreutziger v. Brox* (1900), 32 O.R. 418.

Judgment of the 10th division court of the county of York reversed. *McCormick Harvesting Machine Co. v. Warnica*, 427.

3. *Territorial Jurisdiction—Cause of Action—Flooding Land—Erection of Dam—Prohibition*.]—In a division court action the plaintiff's claim was for damages for injuries caused to his lands, which were situate within the limits of the division in the court of which his action was entered, by reason of their having been overflowed and his crops damaged by waters alleged to have been unlawfully brought by the defendants to and cast upon his lands. The backing of the water was alleged to have been caused by a dam which the defendants had erected on their own lands, situate beyond the limits of such court :—

*Held*, that the erection of the dam was part of the cause of action, and therefore the whole cause of action did not arise within the jurisdiction of the division court in which the action was brought; and prohibition was ordered. *Re Doolittle v. Electrical Maintenance and Construction Co.*, 460.

4. *Post Diem Interest on Mortgage—Splitting Cause of Action*

— *Jurisdiction.*] — See PROHIBITION, 1.

### DIVISIONAL COURT.

*Jurisdiction—Justice of the Peace—Orders Absolute Under sec. 6, ch. 88, R.S.O. 1897, Judge in Court.*] — Orders absolute requiring a justice of the peace to do any act relating to the duties of his office under sec. 6 of ch. 88, R.S.O. 1897, are not final, but are appealable, and as a result should be heard before a single Judge sitting as the High Court and not before a Divisional Court. *Rex v. Meehan et al*, 361.

### DOMICIL.

See COSTS, 3.

### DOMINION AND PROVINCIAL ACTS.

*Construction — Inconsistent Provisions — Interference with Property and Civil Rights in Province.*] — See CONSTITUTIONAL LAW.

### DOWER.

*Vendor and Purchaser—Evidence of Election.*] — A will contained gifts to the widow including an annuity to be accepted in lieu of dower, which was regularly paid to her, and which she apparently had elected to accept in lieu of dower:—

*Held*, that a purchaser of real estate from the executors selling

under the powers conferred by the Trustee Act, R.S.O. 1897, ch. 129, sec. 18, was entitled either to a release from her or to a declaration from her in form sufficient to estop her as against him from claiming dower. *Re Bradburn and Turner*, 351.

### EASEMENT.

*Projecting Eaves—Descending Water and Snow—Common Owner—Conveyances by—Grant and Reservation of Rights.*] — Plaintiff's predecessor in title built two houses on a lot with a passageway between them, and with the eavestrough and part of the eaves of the westerly house projecting over the passageway. He then conveyed to defendant's predecessor in title the westerly house "with the privilege and use of the projection of the roof . . . as at present constructed," and covenanted for the quiet and undisturbed enjoyment of the projection and that on any sale or conveyance of the house to the east he would "save and reserve the right . . . to such projection."

Subsequently he conveyed the easterly house with the land between the two houses to the plaintiff "subject to the right . . . to the use of the projection . . . as at present constructed":

*Held*, that the defendant was not bound to prevent snow and water discharged from the clouds upon his roof from falling

from it upon the plaintiff's land, and that the easement of shedding snow and water, as had been done ever since the defendant's house was built, was necessary to the reasonable enjoyment of the property granted; that the original grantor could not, after such a grant, insist upon the grantee altering the construction of the roof so as to prevent the snow and water coming down, and the plaintiff stood in no higher position than the grantor, and that the projection of the roof carried with it the necessary consequence that water and snow falling upon the roof must to a large extent descend upon the land below.

Judgment of the county court of the county of York reversed. *Hall v. Alexander*, 482.

### **ELECTRIC COMPANY.**

See ASSESSMENT AND TAXES, 3.

### **ESTOPPEL.**

*Deed—Privies in Estate—Reservation in Deed—Action not based on Deed set up as Estoppel.*—A person who had acquired title by possession to certain lands nevertheless afterwards took a conveyance from the owner by paper title for an expressed consideration of \$900, reserving to the grantor the mines and minerals, and gave a mortgage back for \$300 "saving and excepting the mines which said mortgagor has no claim to":—

*Held*, that this did not re-vest the mines in the grantor, nor was a subsequent owner estopped by the exception in the mortgage from claiming the mines as against one deriving title from the grantor, the action not being based on the mortgage, but being wholly collateral to it. *Dodge v. Smith*, 305.

### **EVIDENCE.**

1. *Corroborative Evidence—Advance of Money—Claim of Interest—Promissory Note—Action on Original Consideration.*—The plaintiff sued the surviving member of a firm, together with the representatives of a deceased member, for money loaned by him in the lifetime of the deceased, to the firm for the purposes of the firm. He also claimed interest, as having been stipulated for at the time:—

*Held*, that inasmuch as there was corroboration as to the main fact, namely the borrowing of the principal, this was sufficient to entitle the plaintiff to recover the interest claimed. *Secor v. Gray*, 34.

2. *Particulars.*—Where in an action by a clerk against his former employer, an hotel-keeper, for an alleged assault and for arrears of wages, the defence was that the plaintiff, contrary to his duty, was disrespectful and uncivil to several of the guests, whereby they left and refused to further patronize the hotel, the plaintiff was held

entitled to an order for particulars, giving the names of such guests. *Scott v. Mewbery*, 252.

3. *Accused Testifying on His Own Behalf—Cross-examination as to Previous Convictions.*]—An accused person who, on his trial for an indictable offence, is examined as a witness on his own behalf, may be cross-examined as to previous convictions. *Rex v. D'Aoust*, 653.

4. *Will—Annuity—Ademption—Evidence of Intention.*]—See WILL, 3.

See CRIMINAL LAW, 1.—ASSESSMENT AND TAXES, 2.

## EVIDENCE OF FOREIGN LAW.

See EXTRADITION.

## EXAMINATION.

See DISCOVERY, 2.

## EXECUTION.

1. *Sale of Land—Advertisement—Distribution—Costs of Execution Creditor—Creditors' Relief Act.*]—Where two writs of execution against lands were placed in the sheriff's hands on the same day, and, no further steps being taken by the first execution creditor, the second execution creditor directed the sheriff to advertise and sell the lands, which he did under the second execution creditor's writ:—

*Held*, that the advertisement was in law the seizure of the lands under the second execution creditor's writ; and, there being no seizure or sale under that of the first, the second was entitled, under sec. 26, of the Creditors' Relief Act, R.S.O. 1897, ch. 78, to payment in full of his taxed costs and the costs of his execution, which exceeded the amount of the residue of the proceeds of the sale after payment of the sheriff's fees. *McGuinness v. McGuinness et al.*, 78.

2. *Fieri Facias—Goods—Liquor License—Covenant to Assign License—Covenant Running with the Land—Interpleader—R.S.O. 1897, ch. 245, sec. 37.*]—A license under the Liquor License Act cannot be seized by a sheriff under a *fieri facias* against goods. The piece of paper upon which it is printed and written ceases to be seizable as an ordinary chattel when it is converted into a license.

The right to sell liquor at a particular place under such a license is a personal one and is not assignable by the holder of it except under the conditions imposed by sec. 37 of the Liquor License Act, R.S.O. 1897, ch. 245. *Walsh v. Walsh*, 158.

3. *Seizure by Sheriff—Bank Notes Paid in a Bank—Property in the Money.*]—A superannuated civil servant having presented his certificate at the wicket of a bank, which paid superannuation allowances for



the Government, the teller counted out the amount in notes and placed them on the ledge in front of the wicket, when, before the payee had touched it, the money was seized by a sheriff's bailiff under an execution against him :—

*Held*, that the property in the money had passed to the payee as soon as it had been placed upon the ledge, and that the execution creditor was entitled to it.

Judgment of the local Master at Ottawa affirmed. *Hall v. Hatch. The Bank of Montreal v. Hatch et al*, 147.

4. *Trade-mark.*]—The right of property in a registered specific trade-mark is not saleable by itself under a writ of execution. *Gegg v. Bassett*, 263.

5. *Interest in Partnership—Sale.*]—*See* CHOSE IN ACTION.

*See* JUDGMENT DEBTOR.

### EXECUTORS AND ADMINISTRATORS.

1. *Representation ad Litem—Tort—Survival of Action—Death of Party Pending Action—R.S.O. 1897, ch. 129, sec. 11—Con. R. 1897, 194, 195.*]—R.S.O. 1897, ch. 129, sec. 11, providing that a person wronged in respect to his person or property by one, since deceased, may maintain an action against the administrators or executors of the latter, does not authorize such an action against an administrator *ad litem* merely, but

only against an executor or general administrator, clothed with full power to collect the assets, pay the debts, and divide the estate which he represents :

*Held*, therefore, that for this, apart from other reasons, the appointment of an administrator *ad litem* should be refused in this action, which was brought against five persons for malicious prosecution, one of whom had died after issue joined but before trial, and whose widow and children refused to administer to the estate.

Judgment of Lount, J., reversed. *Hunter v. Boyd*, 183.

2. *Surrogate Courts—Grant of Administration—Nominee of Next of Kin in Ontario—Discretion—Revocation—Fraud.*]—Only one of the next of kin, the sister, of an intestate resided in Ontario, and, upon the consent of the sister and her children, letters of administration were granted by a surrogate court to the defendant, the husband of the sister's daughter. A brother of the intestate, resident in the United States, brought this action to revoke the grant. It was stated in the defendant's petition that all of the next of kin had renounced in his favour, but it was plain from the renunciation, which was filed, that this statement was intended to refer only to the next of kin resident in Ontario :—

*Held*, that the surrogate court had before it all those who were required by sec. 41 of the Sur-

rogate Courts Act, R.S.O. 1897, ch. 59, to be cited or summoned, and the consent and request of all of them that the defendant should be appointed administrator, and, having regard to the nature of the property of the deceased, and the advanced age and illiteracy of his sister, that the Judge had not exercised his discretion improperly in directing the grant to be made to the defendant.

*Seemle*, that, even if the discretion had been improperly exercised, the grant would not have been revoked.

The practice of the surrogate courts in this Province is to apply the provisions of sec. 59 of the Act more liberally than do the English Courts the corresponding provision of the English Probate Act.

*Held*, also, affirming the finding of the surrogate court, that the defendant had not made false suggestions nor concealed material facts for the purpose of obtaining the grant. *Carr v. O'Rourke*, 632.

See WILL, 1—SURROGATE  
COURTS, 2.

## EXECUTOR'S POWER TO SELL.

See VENDOR AND PURCHASER, 3.

## EXTENSION AGREEMENT.

See BANKRUPTCY AND INSOL-  
VENCY, 1.

## EXTRADITION.

*Contempt of Foreign Divorce Judgment—Parent Stealing his own Child—Evidence of Foreign Law—Onus—Criminal Code, 55-56 Vict. ch. 29, sec. 284 (D.).*

—The prisoner and his wife were absolutely divorced in the State of Illinois, U.S., where they were domiciled, by a decree which gave the custody of their child, five years of age, to the wife, with permission to the prisoner to take it out in the day time, returning it the same day. The prisoner having thus obtained the child, carried it away to Canada:—

*Held*, on extradition proceedings, that "child-stealing" is an extraditable offence, and the evidence taken before the extradition commissioner shewing this to be a case of child stealing under sec. 284 of the Criminal Code, 55-56 Vict. ch. 29 (D.), was sufficient to warrant the extradition of the prisoner in the absence of evidence of foreign law, as the Court would assume the crimes to be identical in the two countries.

*In re Murphy* (1894-5), 26 O.R. 163, 23 A.R. 386, followed.

Section 284 of the Criminal Code does not exclude the case of a father and child.

A crime does not become any the less a crime because it also happens to be a contempt of Court, as in this case.

*Held*, also, that the prisoner's contention that he had acted in good faith because he had been advised that the divorce decree

having been obtained collusively, was a nullity, would be proper matter of defence on the trial, but could not be dealt with by the magistrate, who had before him the foreign decree and the wife's oath that she did not collude. *Rex v. Watts*, 368.

See BAIL.

### **FALSA DEMONSTRATIO.**

See DEED, 1.

### **FAMILY ARRANGEMENT.**

See LIMITATION OF ACTIONS.

### **FINDINGS OF TRIAL JUDGE.**

See WAY, 3.

### **FRANCHISE.**

See COMPANY, 4.

### **ILLEGAL ARREST.**

See MALICIOUS PROCEDURE.

### **ILLEGAL VOTING.**

*Municipal Elections — Indictable Offence.*]—See CRIMINAL LAW, 4.

### **IMPROVEMENTS.**

See ASSESSMENT AND TAXES, 2.

### **INCITING TO GIVE FALSE EVIDENCE.**

See CRIMINAL LAW, 3.

### **INFANT.**

*Bond—Void or Voidable—Ratification—Breach—Damages—Interest.*]—To secure the plaintiff against loss by reason of his purchase, upon the defendant's representations of 55 shares of company stock, at \$10 per share, the defendant gave the plaintiff his bond in the penal sum of \$1,100 conditioned to indemnify the plaintiff against any loss or damage he might sustain in reference to the stock, and conditioned also that at any time after the date of the bond the defendant should, at the request of the plaintiff, purchase from the plaintiff or find him a cash purchaser for 11 of the 55 shares at \$50 per share, less expenses of sale, not to exceed 10 per centum. The defendant was an infant when he executed the bond:—

*Held*, that the bond was not void *ab initio*; that it was only voidable; and, upon the evidence, that it was adopted and ratified by the defendant after he had attained full age.

2. That the shares held by the plaintiff not being of any value, the plaintiff's damage by reason of the breach of the bond was \$495, the price of the 11 shares, less 10 per centum.

3. That the recovery was not for a debt or liquidated demand, and the plaintiff was not entitled to interest, the amount not having been ascertained until judgment. *Beam v. Beatty*, 345.

**INJUNCTION.**

See *WAY*, 2.

**INSURANCE.**

*Fire Insurance—Renewal—Prior Insurance—Action—Parties—Mortgage.*]—The renewal, as it is commonly called, of a contract of insurance is not a renewal or extension of the original contract, but a new contract based as far as applicable upon the original application and in accordance with the policy issued in pursuance thereof. Where, therefore, at the time of such a new contract by way of renewal no prior insurance is in force the insurance is not avoided although when the original contract was entered into prior insurance was in force and this fact was not disclosed.

Judgment of *Rose, J.*, 32 O.R. 369, reversed.

Mortgagees to whom by a policy the loss is made payable as their interest may appear have a right of action upon the policy in their own name against the insurers and are entitled to enforce payment to the extent of their interest. But if in such a case there is no mortgage or subrogation clause containing a direct agreement with the mortgagees they stand in the same position as the mortgagor and their claim may be defeated by any defence which would have been a good defence as against the mortgagor.

*Livingstone v. Western Ins. Co.* (1869), 16 Gr. 9, and *Mitchell v. City of London Assurance Co.* (1888), 15 A.R. 262, followed.

*Omnium Securities Co. v. Canada Fire and Marine Ins. Co.* (1882), 1 O.R. 494, observed upon. *Agricultural Savings and Loan Company v. Liverpool and London and Globe Insurance Company. Agricultural Savings and Loan Company v. Alliance Assurance Company*, 127.

**INSURANCE COMPANY.**

See *WRIT OF SUMMONS*, 3.

**INTEREST.**

1. *Irregular Judgment—Monies Retained Under—Absence of Fraud or Misconduct—Order to Refund.*]—Where executors, who were also residuary legatees, acting *bond fide* under a judgment afterwards held by the Court of Appeal to be irregular and not binding on the parties concerned, retained a greater sum of money than they were subsequently held entitled to, but were exonerated from all fraud, or misconduct, they were held not chargeable with interest. *Boys' Home v. Lewis*, 208.

2. *Post Diem Interest on Mortgage.*]—See *PROHIBITION*.

See *ARBITRATION AND AWARD*, 3.—*MORTGAGE*, 2.—*EVIDENCE*, 1.—*INFANT*.



**IRREGULAR JUDGMENT.**

*See* INTEREST, 1.

**JOINDER OF PARTIES.**

*See* LIEN, 1.—PRACTICE, 1.

**JUDGMENT.**

*Date of — Amendment — Death of Plaintiff between Argument and Judgment — Administrator ad Litem.*]—The plaintiff died after the argument of an appeal by him from the judgment of the High Court dismissing his action with costs, but before judgment was given on such appeal. The Court was not informed of the death, and gave judgment dismissing the appeal with costs. The defendants, in ignorance of the death, obtained the issue of the certificate of judgment, which bore date as of the day on which the judgment was pronounced. Upon an application made by the defendants some months later, the Court directed that the certificate should be amended by dating it as of the day of the argument, and by inserting in the body thereof a direction that it be entered as of that day.

*Turner v. London and South-Western R.W. Co.* (1874), L.R. 17 Eq. 561, and *Ecroyd v. Coulthard*, [1897] 2 Ch. 554, followed.

The defendants were entitled to have an administrator *ad litem* appointed to represent the plaintiff's estate in order that the costs of the action and ap-

peal might be recovered. *Gunn v. Harper et al*, 693.

**JUDGMENT DEBTOR.**

*Examination of Transferee — Third Mortgagee — "Exigible under Execution" — Rule 903.*]—A third mortgage upon real estate made by a judgment debtor is not a transfer of property "exigible under execution," within the meaning of Rule 903, and the third mortgagee is not, therefore, liable to be examined as a person to whom such a transfer has been made. The words quoted refer to legal execution and do not include equitable execution or the appointment of a receiver. *Canadian Mining and Investment Co. v. Wheeler*, 210.

**JURISDICTION.**

*Action to enforce Mechanic's Lien begun by Statement of Claim—Service out of Ontario — Jurisdiction to Allow.*]—*See* LIEN, 4.

*Divisional Court—Justice of the Peace — Orders Absolute under sec. 6, ch. 88, R.S.O. 1897 — Judge in Court.*]—*See* DIVISIONAL COURT.

*Division Court.*]—*See* PROHIBITION.

*Division Court—Breach of Undertaking—Amount Ascertained by Signature.*] — *See* DIVISION COURT, 2.

**JURY NOTICE.**

See TRIAL, LIBEL.

**JUSTICE OF THE PEACE.**

See DIVISIONAL COURT.

**KEEPING DISORDERLY OR  
COMMON BETTING HOUSE.**

*Race Track of Incorporated Association—Conviction—Code sections 197 and 204.*—See CRIMINAL LAW, 6.

**LANDLORD AND TENANT.**

*Lease—Renewal—Increased Rent—Arbitration.*—In a lease for twenty-one years the rent fixed was, for the first year \$106.88, for the next four years \$130 a year, for the next five years \$145 a year, and for the remaining eleven years \$178 a year. The lease contained a covenant by the lessor to renew for a further term of twenty-one years, “*at such increased rent as may be determined upon as hereinafter mentioned, payable in like manner, and under and subject to the like covenants . . . as are contained in these presents.*” The lease provided for the appointment of arbitrators to determine the rent to be paid under the renewal lease:—

*Held*, that the arbitrators were bound to award an increased rent under the terms of the reference to them, but they might award a mere nominal increase if they thought proper;

the increase was to be based upon the rent reserved for the whole term, and not for any particular year or years of it; and might be upon each year's rent or upon the average of the whole twenty-one years, but so that in the result the average annual rent should be greater for the future term than the past.

*In re Geddes and Garde* ((1900), 32 O.R. 262, approved. *In re Geddes and Cochrane*, 75.

See COVENANT.

**LEASE.**

See COVENANT.

LANDLORD AND TENANT.

**LEGACY.**

*Succession Duty.*—See REVENUE.

**LEGITIMACY.**

See MARRIAGE.

**LIBEL.**

*Trial—Jury Notice.*—In actions of libel it is not necessary to file and serve a jury notice. *Puterbaugh v. The Gold Medal Manufacturing Company*, 259.

**LICENSE.**

*Patent for Invention—Alterations and Improvements—Right of Licensee.*—See PATENT FOR INVENTION.

### LIEN.

1. *Mechanic's Lien—Statutory Action to Realize—Joining Other Causes of Action—Parties—Architect.*]—In an action begun under sec. 31 of the Mechanics' and Wage-Earners Lien Act, R.S.O. 1897, ch. 153, by the filing of a statement of claim, to realize a lien created by the Act, the plaintiff cannot include other causes of action and other matters.

Where the plaintiff in such an action claimed to be entitled to a lien against the owner of land who had erected a building thereon, and joined as a defendant the architect of the building, whom he charged with fraudulently refusing to give a certificate for the amount which the plaintiff claimed to be entitled to recover, and asked that the architect might be ordered to pay the amount claimed, with damages for his fraudulent breach of duty, and the costs of the action, the name of the architect was struck out.

*Seemle*, that, as against the owner, the claim to a proper certificate might be maintained in this action as one of the matters involved in the claim to a lien. *Bagshaw v. Johnston et al*, 58.

2. *Mechanics' Lien—Mining Location—Blacksmith—Cook.*]—A blacksmith employed for sharpening and keeping tools in order for the work of mining is entitled to a lien for his wages on the mining location, but a

cook who does the cooking for the men is not.

Adjoining mining locations when they are water lots if "enjoyed" with the mining location on which the mine is situate are subject to liens for work performed on the mine. *Davis et al v. The Crown Point Mining Co.*, 69.

3. *Contract on two Adjoining Buildings—Lien for Work Done on One—Registration—Extent of Work Done.*]—Where a contract was made with the respective owners of adjoining lands, on which two separate buildings were erected, but included under one roof, for the repair thereof at one entire price, separate accounts being kept of the work done and materials furnished on each building, a lien attaches, and can be enforced under Mechanics' Lien Act against the lands of each of such owners for the price of the work done and the materials provided on the buildings respectively.

The findings of the local Master, who tried a Mechanics' Lien action, as to the fact of the work being done and the materials furnished within thirty days prior to the lien being registered, and as to the extent of the said work and materials, was upheld, although the evidence was contradictory, there being evidence to support such findings. *Booth v. Booth*, 294.

4. *Action Begun by Statement of Claim—Service out of Ontario—Jurisdiction to Al-*

*low.*—There is no authority in the Courts of this Province to allow service out of Ontario of a statement of claim filed as the initial step in an action.

*In re Busfield—Whaley v. Busfield* (1886), 32 Ch. D. 123, followed.

Such service is not a matter of practice, but of jurisdiction, and Rule 3 does not enable the Court to apply the analogous procedure as to writs of summons.

*Seemle*, that if there were power to allow service of such a statement out of Ontario, it could not be allowed *nunc pro tunc* after it had been effected without an order.

Service out of Ontario of a statement of claim, the initial proceeding in an action to enforce a mechanic's lien, under R.S.O. 1897, ch. 153, upon foreigners resident in a foreign country, and all subsequent proceedings, set aside.

History of the legislation in Ontario as to service out of the jurisdiction. *Pennington v. Morley et al*, 514.

5. *Vendor's Lien—Timber—Cut and Uncut—Interest in Land—Identification.*]—The owner of land by agreement in writing sold the timber on it, removable within three years, taking promissory notes from the purchaser in payment. The purchaser, who was acting as an agent, assigned all his interest in the agreement to his principal, and transferred the notes made by his principal to the landowner, who subsequently

sold and conveyed the land and all her interest in the timber and notes to the plaintiff. The assignee of the purchaser's rights cut and removed some of the timber from the land, and cut and piled on the land a lot of cordwood which he sold to the defendant, but did not pay the notes. The defendant, who had notice of the contract for the sale of the timber and of the non-payment of the price, sought to remove the wood:—

*Held*, that the sale of the timber was that of an interest in land in respect of which the plaintiff was entitled to a vendor's lien for the amount of the notes, which was not displaced by the cutting and sale of the timber so long as it could be identified and remained on the land, and that he was entitled to an injunction. *Summers v. Cook* (1880), 28 Gr. 179, followed. *Ford v. Hodgson*, 526.

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## LIFE INSURANCE.

*See* WILL, 2.

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## LIMITATION OF ACTIONS.

*Real Property Limitation Act—Parent and Child—Tenancy at Will—Accrual of Right of Entry—Commencement of Statute—Caretaker—Effect of Entry by Consent—Creation of New Tenancy—Assessment—Agreement—Concealment of Facts—Family Arrangement—Will—Devise Subject to Charge—Election—Mistake.*]—In the autumn of 1879 the defendant



was put by his father in possession of a farm. His father told him that he had bought the farm for him, but the defendant knew that what was done had not the effect of transferring the title to him, and was aware that it must be obtained either by conveyance or devise from his father. The father did not intend to divest himself of the ownership of the farm, but to leave himself free, in devising it, as he intended, to his son, to charge it with the payment of such sum as he might think it right to require him to pay. The defendant continued in possession of the farm until his father's death, in 1900, occupying it for his own benefit, and having the exclusive enjoyment of the profits; he paid no rent and rendered no service or other return for it, and gave no acknowledgement of his father's title; he also made valuable permanent improvements at his own expense:—

*Held*, that the title of the father had, long before his death, by force of the Real Property Limitation Act, R.S.O. 1897, ch. 133, become extinguished. The defendant became, upon his entry with the permission of his father, a tenant at will, and that tenancy never having in fact been determined, the father's right of entry first accrued at the expiration of one year from the commencement of it (sec. 5, subsec. 7), and was barred at the expiration of eleven years.

There was no evidence that

the defendant was a caretaker or servant of his father.

Upon the expiration of the tenancy at will, the possession of the defendant became that of a tenant at sufferance, and the running of the statute was not stopped by an entry, unless, before the statute had operated to extinguish the title of the testator, a new tenancy at will was created; and this would have been the case even if the tenancy at will had been put an end to in fact, and not merely by force of sec. 5, subsec. 7; the effect of the subsection is, that it is for the purposes of the statute only that the tenancy at will is to be deemed to be determined at the expiration of a year from the time when it began.

*Held*, however, that there was no entry by the father sufficient to prevent the running of the statute; a visit made by the father to the son, within eleven years before action, when he lived with him on the farm for a few days, was not an entry on the land and did not put an end to the existing tenancy at will.

In 1879 and 1880 the farm was assessed in the name of the father as well as of the defendant, to the former as "freeholder," and to the latter as "owner," and from 1880 to 1899 to both as freeholders, and in 1882 this was done at the instance of the defendant, who also knew of the way in which the assessment was made in each of these years:—

*Held*, that this was not evidence of a new tenancy at will created within eleven years before the commencement of the action.

*Doe d. Bennett v. Turner* (1840), 7 M. & W. 226, and (1842), 9 M. & W. 643, distinguished.

By an agreement in writing, made a few days after the death of the father, between the devisees and legatees under the father's will, the defendant admitted and acknowledged that, although the farm was occupied by him, the father was at the time of his death the owner in fee simple of it, and agreed to abide by the will and to carry out the terms of it. By the will the father devised the farm to the defendant, charged with the payment of \$4000. This agreement was made before the will had been opened or the contents of it known to the defendant; no doubt existed as to the validity of the will; and the object of the agreement was, though this was not known by or communicated to the defendant, to get rid of any difficulty which might arise if the defendant asserted title to the farm under the Real Property Limitation Act, but the defendant did not in fact know of his rights under that statute:—

*Held*, that, in these circumstances, the agreement was not, even when viewed as a family arrangement, binding on the defendant.

*Fane v. Fane* (1875), L.R. 20 Eq. 698, applied and followed.

*Held*, also, that, if there was

any election by the defendant to take under the will, it was made under a mistake as to his rights; and besides, if the agreement fell, what the defendant did which was relied on as being an election, being a part of the same transaction, must fall with it. *McCowan et al. v. Armstrong*, 100.

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### LIQUOR LICENSE.

*See* EXECUTION, 2.

COVENANT.

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### LUNACY.

*See* ALIMONY.

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### MALICIOUS PROCEDURE.

*Illegal Arrest—Joint Conviction—Invalid Warrant—Indemnity Resolution by Municipal Corporation—Ultra Vires—Constable—R.S.O. 1897, ch. 88, secs. 1 (2), 13, 14—Code 975, 976, 980.*—The plaintiffs on the information of the defendant, a constable, and another constable were summoned before a magistrate charged with wilfully damaging a spring of water on a highway but did not attend, and in their absence were convicted and jointly fined. A question having been raised as to the regularity of the proceedings, the magistrate hesitated about issuing a warrant until the defendants, the township council, passed a resolution indemnifying him against costs, which they did.

The warrant, directed "To all

or any constables," etc., was issued, following the form of the conviction, and handed to the defendant constable and another constable, who between them arrested the plaintiffs, who were imprisoned until the fine and costs were paid.

In an action against the township council and one of the constables for maliciously enforcing an illegal warrant:—

*Held*, that the defendant constable had acted as such in the execution of the warrant and was entitled, although he had laid the information, to the protection extended by law to public officers of the peace; that the warrant being bad on its face, he was by virtue of sec. 21 of the Code exempt from all criminal responsibility, and was protected from a civil action by virtue of R.S.O. 1897, ch. 88, secs. 1 (2), 13 and 14, and secs. 975, 976 and 980 of the Code; the action not having been brought within six months, and no notice of action having been given.

*Ex parte McCleave* (1900), 35 New Bruns. R. 100, distinguished.

*Held*, also, that there was no proof of knowledge on the part of the council that either the conviction or warrant was illegal or that they were acting other than *bonâ fide* for the protection of the spring, and no evidence of malice; that even assuming knowledge by the council of the invalidity of the conviction and warrant, the resolution was *ultra vires*, and they were not bound to make good any costs or

damages in consequence of the resolution.

*McSorley v. The Mayor, etc., of the City of St. John* (1881), 6 S.C.R. 531, distinguished.

Judgment of the county court of the county of Perth affirmed. *Gaul et al v. The Corporation of the Township of Ellice et al*, 438.

## MANDAMUS.

*See* CRIMINAL LAW, 4.

## MARRIAGE.

*Widow of Deceased Brother—Validity—Legitimacy—Presumption—Will.*—The testator was married on the 30th June, 1855, to the widow of his deceased brother; she survived the testator. In 1884 and 1885 the testator was living with another woman as his wife:—

*Held*, that the validity of the marriage between the testator and the widow of his deceased brother could not be disputed after the death of the testator; and the presumption arising from the testator's relationship with another woman was rebutted by the fact of his lawful wife being then alive; and the appellants, the children of the testator and the other woman, were not legitimate and had no *locus standi* to appeal from a judgment establishing a document as the will of the testator.

*Hodgins v. McNeil* (1862), 9 Gr. 305, and *Re Murray Canal* (1884), 6 O.R. 685, approved. *Kidd et al. v. Harris et al*, 60.

## MARRIED WOMAN.

*Trusts and Trustees — Appointment of Married Woman as Trustee.*]—Under the Trustee Act R.S.O. 1897, ch. 129, a married woman was appointed a trustee to fill a vacancy under the circumstances set out in the report. *Re Eliza Gough Estate*, 206.

## MASTER AND SERVANT.

1. *Non-observance of Rules — Mines Act.*]—A master is entitled to make and insist on the observance of reasonable rules for the conduct of his business, and if in consequence of the non-observance of these rules by a servant, he is injured, the master is not liable.

It was held in this case that the master was not liable in damages for the death of the servant resulting from the servant using in direct violation of rules the cage instead of the ladders to ascend from a mine, although the ladders did not in some particulars conform to the requirements of the Mines Act.

Judgment of Robertson, J., reversed. *Anderson v. Mikado Mining Company*, 581.

2. *Negligence — Unguarded Machinery—Negligence of Fellow-servant—Operating Cause—Damages.*]—A workman employed by the defendants in order to do his work had to climb a stepladder and step over the unguarded rim of a cog-wheel to a plank. In coming from his work a truckman re-

moved the ladder as he was stepping on it, and in recovering himself his leg went through the spokes of the wheel, which was in motion, and he was injured.

The jury found: that the injury was caused by the negligence of the defendants, and not by workman's own negligence or want of proper care: that it was only to a certain extent caused by the negligence of a fellow-servant, for if the wheel had been properly guarded and the ladder properly fastened to the floor the accident would not have happened: that the negligence of the defendants consisted in not guarding the wheel and fastening the ladder: that the wheel was a dangerous part of the mill gearing, and was not as far as practicable securely guarded, and that plaintiff would not have received the injury if it had been so securely guarded:

*Held*, that the findings of the jury as to negligence were amply supported by the evidence and could not be interfered with.

That the defendants were bound at common law to take all reasonable precautions for the safety of their workmen, and it was for the jury to say what were such reasonable precautions.

That the defendants were also bound by the Factories Act to securely guard as far as practicable all dangerous parts of their machinery.

That the jury having so found, the intervention of the truckman in wrongfully taking away



the ladder did not relieve the defendants from the consequences of their negligence, which still remained an operating cause of the injury.

*Mann v. Ward* (1892), 8 Times L.R. 699, not regarded as an authority.

As the damages were excessive a new trial was granted unless the plaintiffs consented to reduce them. *Myers v. The Sault St. Marie Pulp and Paper Co.* 600.

3. *Slander—Privilege.*]—See DEFAMATION.

See CONTRACT, 2

### MATERIALITY.

See DISCOVERY, 3.

### MINES ACT.

See MASTER AND SERVANT, 1.

### MISTAKE.

*Pleading — Amendment — Increasing Amount Claimed.*]

— The plaintiff was allowed under Rule 312 to amend his statement of claim in an action upon a building contract by increasing the amount claimed for extras, and to amend his reply by changing acceptance into non-acceptance of money paid into court by the defendant, notwithstanding that the plaintiff had filed a memorandum of acceptance, under Rule 423, although he had not taken the money out of court; the court

being satisfied that the plaintiff had made a mistake, and on finding it out, had moved with reasonable promptness to correct it, and that no real prejudice was done to the defendant. *Emery v. Webster* (1853), 9 Ex. 242, followed. *Chevalier v. Ross*, 219.

### MORTGAGE.

1. *Mortgagee's Costs — Unnecessary Proceedings—Tender — Waiver.*]—A mortgagee, as a holder of an overdue debt, is entitled to take the promptest proceedings to recover it and to the costs of such proceedings, but if he abandon them he cannot then claim the costs.

A mortgagor's solicitor left a letter at the office of the mortgagee's solicitor stating that if the latter would call at his office he could have the principal and interest then due on the mortgage, naming the amount correctly. The mortgagee's solicitor did not call; and some days later the mortgagor's solicitor wrote to the mortgagee telling her he was prepared to pay the said sum, which letter the mortgagee's solicitor answered by stating the amount claimed, which included subsequent interest and certain costs, the right to which had long been in dispute between the two solicitors, and adding that the whole matter of dispute between them hinged upon the right to these costs:—

*Held*, that the latter words were merely descriptive of the

question in controversy and could not be treated as a waiver of the proper tender, and that the mortgagee was entitled to have the money unconditionally produced and offered to her or her solicitor by the mortgagor, which had not been done in this case. *Middleton v. Scott*, 26.

2. *Building Society—Monthly Payments—Maturity of Shares—Depreciation of Assets—Deduction from Amount Credited to Shareholders—Right to Discharge—Novation—Interest—Premium—Bonus—R.S.O. 1887, ch. 169, sec. 38—R.S.O. 1897, ch. 205, sec. 21—R.S.C. 1886, ch. 127, sec. 3.* — The plaintiff became a member of and mortgaged his lands to a building society incorporated under R.S.O. 1887, ch. 169, as collateral security for repayment of the value of his stock which had been advanced to him, which stock he covenanted to assign forthwith to the company and to repay its par value in 96 monthly payments, “as per rules, terms and conditions of the company”; and he signed ninety-six promissory notes accordingly, which included interest at six per cent. and forty cents per share per month, bonus or premium. Afterwards the company sold out to another similar company and the plaintiff accepted shares in the latter in lieu of his shares in the former, contracting at the same time to observe the by-laws of the latter company, one of which provided that the

monthly dues under mortgages must continue to be paid “until maturity of the pledged shares.” Having paid the ninety-six notes he claimed a discharge. Owing, however, to a depreciation in the value of the assets of the vendor company, thirty-eight per cent. had had to be deducted from the amount credited on the plaintiff’s shares, and a discharge was therefore refused:—

*Held*, that there had been a complete novation and change of membership by the plaintiff from one company to the other; and that the plaintiff was not entitled to a discharge till he had paid his proportion of the deficiency resulting from the depreciation of assets.

*Held*, also, that R.S.C. 1886, ch. 127, sec. 3, relating to interest on mortgages and embodied in R.S.O. 1897, ch. 205, sec. 21, has no application to such a building society mortgage as that in question; and that, moreover, the rate of interest charged was only six per cent., because the bonus or premium, which was authorized by R.S.O. 1887, ch. 169, sec. 38, was not to be considered as interest. *Lee v. Canadian Mutual Loan and Investment Co.*, 191.

3. *Mortgagee so dealing with Property as to Lose Power to Reconvey—Action on Covenant—Discharge—Right of Way* — A mortgagee not only discharged a portion of the mortgaged lands upon part payment,

as he was entitled to do under the mortgage, but also assented to a right of way across the whole of the property granted by the then owners of the equity to a purchaser of a portion of it, and released such right of way from his mortgage:—

*Held*, that the mortgagee having debarred himself from restoring the mortgaged lands unaltered in character and quantity, in a manner unauthorized by the terms of the mortgage, owing to the right of way, an assignee of the mortgage could not claim under the covenant therein in an administration of the mortgagor's estate.

It is proper, however, in such a case that the claimant should have an opportunity within a limited time to get into a position so to restore the land, and twenty days were here allowed for that purpose. *In re Thuresson, McKenzie v. Thuresson*, 271.

4. *Judgment Debtor—Examination of Transferee—Third Mortgagee* — “*Exigible under Execution.*”]—A third mortgage upon real estate made by a judgment debtor is not a transfer of property “exigible under execution” within the meaning of Rule 903, and the third mortgagee is not, therefore, liable to be examined as a person to whom such a transfer has been made. *Canadian Mining and Investment Co. v. Wheeler*, 210.

5. *Shares in Building Soci-*

*ety held “in trust”*—*Notice—Purchaser of Land Subject to Mortgage Collateral to Loan on Shares without Notice that Shares pledged for prior Loan—Consolidation.*]—See TRUSTS AND TRUSTEES, 3.

See ASSESSMENT AND TAXES, 2  
—INSURANCE.—PROHIBITION, 1  
—VENDOR AND PURCHASER, 2.

## MUNICIPAL CORPORATIONS.

1. *Tax Sale — Power of Treasurer — Advertising Expenses*—*R.S.O. 1897, ch. 224, sec. 224.*]—A treasurer of a town has no authority to bind the municipal corporation by a contract to pay the cost of advertising his list of lands for sale for arrears of taxes. Under the Assessment Act, *R.S.O. 1897, ch. 224, sec. 224*, he is only *persona designata* to act on behalf of the municipality, and the municipality has no authority to interfere with him in the performance of such defined duties. A creditor in respect to the publication of such advertisements must look to him personally. *Warwick v. The County of Simcoe* (1900), 36 C.L.J., 461, approved of and followed. *Canadian Bank of Commerce v. Town of Toronto Junction*, 309.

2. *By-law—Bonus—Promotion of Manufactures—Removal of Industry “already established”*—*Municipal Amendment Act, 1900, sec. 9*—*Motion to Quash Registered By-law—Delay.*]—By sec. 9 of the Muni-

cipal Amendment Act, 1900, a new sub-section, 12, is added to sec. 591 of the Municipal Act, R.S.O. 1897, ch. 223, which new sub-section provides that councils of municipalities may pass by-laws for granting aid by way of bonus for the promotion of manufactures within the limits of the municipality, but (e) "no by-law shall be passed by a municipality for granting a bonus to secure the removal of an industry already established elsewhere in the Province:"—

*Held*, that by-laws of a town granting aid to persons who were carrying on a manufacturing business in a village, and who, as the by-law recited, were about to remove their plant and machinery and carry on the same business in the town, were illegal under cl. (e), notwithstanding that these persons had determined, before negotiating with the town, to remove their business from the village at all events, and to such other place as should offer the largest inducement.

The by-laws were quashed, upon an application made within three months after they were registered, and nearly three months after they were passed, notwithstanding that the industry had been in the meantime established in the town and the money paid over to the manufacturers.

Decision of Lount, J., reversed.  
*Re Village of Markham et al. and Town of Aurora*, 609.

### 3. Municipal Elections—Quo

*Warranto—Notice of Motion—Time—Wrong Day of Week—Mistake—Amendment.*]—A notice of motion in the nature of a quo warranto to contest the validity of the election of the respondents as aldermen of a city, was, by fiat of the Master in Chambers under sec. 220 of the Municipal Act, R.S.O. 1897 ch. 223, allowed to be served upon the respondents, and was served on the 15th February (seven clear days' notice being required by sec. 221) for "Tuesday the 24th day of February" the 24th February being, in fact, a Monday. Afterwards, the relator served upon the respondents a notice to the effect that the day on which the motion would be made was Tuesday the 25th February, but this notice was not a seven clear days' notice:—

*Held*, that the notice of motion was good and sufficient notice for Tuesday the 25th February, and that the sureties upon the relator's recognizance, as required by sec. 220, would have no ground of objection because of the proceedings not being properly prosecuted.

*Eldon v. Haig* (1819) 1 Chit. 11, followed.

*Semble*, that the practice in actions in the High Court is applicable to these *quo warranto* proceedings. *Rex ex rel Roberts v. Ponsford et al.*, 410.

*Illegal Voting—Indictable Offence.*]—See CRIMINAL LAW, 4.

*Enforcement by Municipality of Statutory Obligation on Rail-*



*way Co.—Prohibition against Removal of “Workshop.”*—*See* RAILWAY, 2.

*Survey—Village Lots—By-law—Cost of Survey—Assessment for.*—*See* SURVEY.

*See* WAY, 1, 2, 3—CONSTITUTIONAL LAW.

### NEGLIGENCE.

*Unguarded Machinery—Negligence of Fellow-Servant—Operating Cause—Damages.*—*See* MASTER AND SERVANT, 2—RAILWAY, 1.

### NOTICE.

*Mortgage of Shares in Building Society held “in trust”—Purchaser of Land Subject to Mortgage Collateral to Loan on Shares without Notice that Shares pledged for Prior Loan—Purchaser of Trust Shares.*—*See* TRUSTS AND TRUSTEES, 3.

### NOTICE OF SALE.

*See* VENDOR AND PURCHASER, 2.

### NOTICE OF TRIAL.

*See* TRIAL, 2.

### NOVATION.

*See* MORTGAGE, 2.

### PARLIAMENT.

*Voters’ List—Notice of Complaint—Form of—Grounds of Objection—Subjoined Lists—*

*Amendment of Notice.*—In a list of complaints contained in a notice of complaint under the Ontario Voters’ Lists Act, R.S.O. 1897, ch. 7, the names of persons wrongfully omitted from the voters’ list were given, and in the column headed “grounds on which they are entitled to be on the voters’ list,” “M.F. and” appeared:—

*Held*, having regard to the provisions of sec. 6 (1) and (7) and Form 6 (list 1) of the Voters’ Lists Act, and of secs. 1 (12), 13, and 56 of the Assessment Act, and of sec. 4 of the Manhood Suffrage Registration Act, that the letters “M.F.” could properly be read as meaning “Manhood Franchise,” and those words were sufficient for the purposes of the notice, while the word “and” should be treated as surplusage.

The notice of complaint consisted of fifteen sheets, each in itself in the form given in the schedule to the Voters’ Lists Act as No. 6, the lists Nos. 1, 2, 3 and 4 being printed on the backs of forms of notices of complaint; only the notice of complaint on the last sheet was filled out and signed by the complainant; but evidence was given that the whole fifteen sheets were attached together when the complainant signed the notice, and handed the whole to the clerk; and they so appeared before the Court. The notice referred to the “subjoined lists:”

*Held*, that the lists were part of the complaint, and it was sufficient in that regard.

*Held*, that, if it were necessary, in order to make the notice of complaint a good one, to amend it so that it should refer explicitly to the annexed sheets, the amendment should not be allowed under sec. 32. *Re Voters' Lists of Carleton Place*, 223.

## PARTICULARS.

See EVIDENCE, 2.

## PARTIES.

1. *Numerous Defendants in Same Interest—Application for Appointment of Solicitor to Defend—Con. Rule 200—Non-applicability of.*—The object of Con. Rule 200, which provides that where there are numerous parties having the same interest, one or more of them may sue, or be sued, or may be authorized by the Court to defend on behalf of, or for the benefit of, all so interested, is to avoid the expense and inconvenience of bringing before the Court a numerous body of persons, all having the same interest; but the Rule does not authorize the making of an order by the Court, on the plaintiff's application, for the appointment of a solicitor to defend for a number of persons in the same interest, who are already defendants to the action. *Ward v. Benson*, 199.

2. *Addition of — Separate Causes of Action—Joinder—Rules 185, 186, 187, 192—Third Party Notice—Indemnity.*—

The plaintiff sued to recover the amount of a book debt assigned to him. The defendants admitted nothing, and pleaded payment and set-off:—

*Held*, that the plaintiff was properly allowed to add as a party defendant the assignor of the alleged debt, and to make a claim against him, in the event of the original defendants succeeding in their defence, basing such claim upon an alleged warranty or a total failure of consideration.

Rules 185, 186, 187, 192, discussed.

*Tate v. Natural Gas and Oil Co.* (1898), 18 P.R. 82, and *Evans v. Jaffray* (1901), 1 O.L.R. 614, followed.

*Smurthwaite v. Hannay*, [1894] A.C. 494, *Thompson v. London County Council*, [1899] 1 Q.B. 840, and *Quigley v. Waterloo Manufacturing Co.* (1901), 1 O.L.R. 606, distinguished.

*Held*, also, that the added defendant was properly allowed to give a third party notice to a bank, upon his allegation that he acted only as the bank's agent in assigning the debt.

*Confederation Life Association v. Labatt* (1898), 18 P.R. 266, followed. *Langley v. Law Society of Upper Canada*, 245.

3. *Application to Strike Out — Matter of Substance.*—An objection that a person joined with others as plaintiff in an action has no title to maintain the action, is matter of substance which should be raised on the pleadings as provided by

Rule 259, and is not a proper subject for an application to strike out parties under Rule 185. *Morang v. Rose*, 354.

### PATENT FOR INVENTION.

*License — Alterations and Improvements—Rights of Licensee.*]—The plaintiff granted to the defendants a license under seal to use a patented invention of his, being an automatic air brake, and to manufacture and equip their rolling stock with the same. He, in this action, complained that though his object was that his brake might be advertised by the defendants' user of it in the form in which he had patented it, the defendants were substituting in part a different unpatented mechanical device of their own, and using the brake as thus altered to his detriment; and contended that if the defendants used his invention at all they must use it in accordance with the form described in his patent, and asked for an injunction:—

*Held*, (ARMOUR, C.J.O., dissenting), reversing the judgment at the trial, that in the absence of agreement to the contrary, as here, there is nothing to prevent a licensee from making such changes or alterations as he thinks proper in the patented invention.

Judgment of Meredith, C.J., 2 O.L.R. 190, reversed. *MacLaughlin et al., v. Lake Erie and Detroit River R.W. Co.*, 706.

### PERIOD OF ASCERTAINMENT.

*See WILL*, 4.

### PERJURY.

*See CRIMINAL LAW*, 3.

### PEWS.

*See CHURCH*.

### PLEADING.

1. *Amendment—Increasing Amount Claimed — Mistake—Money Paid into Court—Acceptance by Mistake.*]—The plaintiff was allowed under Rule 312 to amend his statement of claim in an action upon a building contract by increasing the amount claimed for extras, and to amend his reply by changing acceptance into non-acceptance of money paid into Court by the defendants, notwithstanding that the plaintiff had filed a memorandum of acceptance, under Rule 423, although he had not taken the money out of Court; the Court being satisfied that the plaintiff had made a mistake, and, on finding it out, had moved with reasonable promptness to correct it, and that no real prejudice was done to the defendant.

*Emery v. Webster* (1853), 9 Ex. 242, followed.

Order of Lount, J., affirmed. *Chevalier v. Ross*, 219.

2. *Statement of Claim—Amendment—Writ of Summons—Two causes of Action—Elec-*

*tion to Pursue One—Penalty—Discovery—Dominion Elections Act, 1900.*]—The writ of summons (issued 30th January, 1901) was indorsed with a claim to recover penalties under the Dominion Elections Act, 1900, and for damages for wrongfully depriving the plaintiff of his vote at an election held on the 7th November, 1900. The statement of claim (delivered 14th March, 1901,) did not assert any claim to penalties, but was confined to the common law cause of action. The statement of defence (delivered 27th March, 1901) denied the allegations of the statement of claim and alleged want of notice of action. The plaintiff obtained the usual discovery from the defendant, without objection. On the 31st December, 1901, after such discovery, and when the action was ready for trial, the plaintiff applied for leave to amend the statement of claim by adding a claim for the penalties mentioned in the indorsement of the writ:—

*Held*, that the defendant in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery.

*Regina v. Fox* (1898), 18 P.R. 343, distinguished.

The plaintiff, having by proceeding at common law obtained from the defendant the discovery which he could not have had in an action for penalties, and having allowed more than a year to elapse before applying for

leave to amend, must, notwithstanding the indorsement of the writ, be taken to have conclusively elected to pursue his common law remedy; and leave to amend was properly refused.

Sections 19, 131, 133, and 142, of the Dominion Elections Act, 1900, discussed. *Rose v. Croden*, 383.

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### POLICE CONSTABLE.

*Acting in Discharge of Duty.*]

—See COSTS, 2.

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### POLICE MAGISTRATE.

See CRIMINAL LAW, 2.

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### POLICIES OF INSURANCE.

See WILL, 2.

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### POSSESSION BY PURCHASER UNDER CONTRACT.

*Waiver of Right to Good Title — Improvements.*] — See VENDOR AND PURCHASER, 4.

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### POWER OF ADVANCEMENT.

See WILL, 5.

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### PRACTICE:

1. *Writ of Summons—Service out of Jurisdiction—Order before Action—Parties—Causes of Action—Joinder—Rules 120, 128, 162 (g), 164.*]—The proper practice under the Rules as they stand (Rules of 1897 Nos. 120, 128, 164) is to



obtain, before the issue of the writ of summons, an order fixing the time for appearance to be inserted in the writ proposed to be issued, and allowing it to be served out of the jurisdiction.

Where the affidavit filed on an application for such an order shewed that the cause of action alleged against three of the defendants, one of whom lived in Ontario, was the causing an information to be laid against the plaintiff in Quebec and the plaintiff to be arrested upon a warrant in Ontario by the fourth defendant, and taken to Quebec and prosecuted there upon a criminal charge, of which he was acquitted, and that against the fourth defendant the unnecessary and unjustifiable handcuffing of the plaintiff in Ontario:—

*Held*, that the plaintiff was not entitled to join the fourth defendant with the other three, the causes of action being separate and having nothing to do with each other.

*Held*, also, that, as one of the three remaining defendants lived in Ontario, and it was alleged that he joined in the laying of the information, he was a proper party to the action, within the meaning of Rule 162 (g), and an order should be made for the issue and service of the writ upon the other two in Quebec.

*Croft v. King*, [1893] 1 Q.B. 419, followed.

But the order should contain a condition that in case the action should be dismissed as against the defendant in Ontario, the plaintiff should consent to

its dismissal as against the other defendants as well. *Re Jones v. Bissonnette et al*, 54.

2. *Discontinuance of Action—Counterclaim—Cause of Action—Jurisdiction.*—Where the plaintiff discontinues his action after the defendant has delivered a counterclaim, the defendant may proceed with his counterclaim as if it were an action; the plaintiff will then be in the same position as a defendant served with a writ of summons; and if the counterclaim is one which the defendant could assert only by virtue of the plaintiff having come into the jurisdiction and sued the defendant, he should not be allowed to proceed with it as a term of permitting the plaintiff to discontinue. *Dominion Burglary Guarantee Co. v. Wood*, 365.

3. *Third Parties—Notice—Time—Enlarging—Rules 209, 353.*—Judgment of Meredith, C.J.C.P., reported, 2 O.L.R. 709, affirmed by Divisional Court. *Parent v. Cook et al*, 350.

4. *Dismissal of Action—Undertaking to go to Trial—Default in Giving—Effect of.*—*Per* MEREDITH, C.J.C.P.—Where an order is made for the doing of an act, such as giving an undertaking to go to trial by a particular date, or in the alternative that the action should be dismissed, when default is made in the doing of the act the order operates to put an end to the action, and no further order is

necessary, and the action being dead the Court has no power to relieve from the consequences of such default.

On an appeal, a Divisional Court being of opinion that under the circumstances the action should be dismissed, declined to consider the question of the necessity of a further application or the power to relieve from the default. *The Crown Corundum and Mica Company, Limited v. Logan*, 434.

5. *Appeal—Supreme Court of Canada—Claim and Counterclaim—Leave ex Cautelâ.*—The plaintiff claimed \$1,500 damages for delay in delivery of iron. The defendants, besides denying the charge of non-delivery in due time, counterclaimed for \$1,223 demurrage. At the trial judgment was given for the plaintiff for \$1,000 and the counterclaim was dismissed. Upon appeal to the Court of Appeal the judgment was varied by limiting the damages to the fall in the price of iron during a considerably shorter time than that fixed in the Court below, the amount to be ascertained on a reference. Upon a motion by the defendants to allow a bond given by them as security upon an appeal by them to the Supreme Court of Canada, the plaintiff's counsel stated that the plaintiff's claim on the reference would be less than \$1,000, and contended that no appeal lay:—

*Held*, however, that as the plaintiff claimed \$1,500 and was

not limited by the judgment of the Court of Appeal to any particular sum, the matter in controversy on the appeal exceeded the sum of \$1,000, so that the appeal lay.

*Held*, also, that upon the counterclaim the sum of \$1,223 was involved and that an appeal lay in respect thereof.

The Court of Appeal declined to grant, *ex cautelâ*, leave to appeal to the Supreme Court of Canada, the case not being one in which leave, if it were necessary, ought to be granted. *Frankel v. Grand Trunk Railway Company*, 703.

See COSTS, 2, 3.—DISCOVERY, 1, 2, 3, 4.—EVIDENCE, 2.—PARTIES, 1, 2, 3.—TRIAL, 1, 2.—WRIT OF SUMMONS, 1, 2, 3, 4.

### PRIVILEGE.

*Confidential Communication—Solicitor and Client.*—See DISCOVERY, 4.

See CRIMINAL LAW, 1.—DEFAMATION.—DISCOVERY, 1.

### PROHIBITION.

1. *Division Court—Post Diem Interest on Mortgage—Splitting Cause of Action—Jurisdiction—R.S.O. 1897, ch. 60, sec. 79.*—Plaintiff, on November 2, 1901, brought an action in a division court for one year's interest due February 1, 1901, and for interest on that sum, amounting together to \$81.50, due on a mortgage, the princi-

pal of which was some years overdue :—

*Held*, that the interest sued for, being interest *post diem*, as to which there was no covenant to pay, was not due the plaintiff *qua* interest, but was recoverable only by way of damages, and the case did not come within the provisions of subsec. (2) of sec. 79 R.S.O. 1897, ch. 60 :—

*Held* also, that the plaintiffs, if entitled to recover interest from February 1st, 1900, were entitled to recover as damages interest down to the date of the issue of the summons amounting to about \$140, which sum was divided for the purpose of suing in the division court, which is forbidden by sec. 79.

Prohibition granted. *Re Phillips v. Hanna*, 558.

2. *Division Courts — Territorial Jurisdiction—Cause of Action.*]—*See* DIVISION COURT, 3.

### PROMISSORY NOTE.

When a promissory note is taken from a borrower as collateral security for money loaned to him, and not in payment, action can be brought for the money lent, notwithstanding that owing to the form of the note it may not be maintainable thereon. *Secor v. Gray*, 34.

### PROSPECTUS.

*See* COMPANY, 2.

### PUBLIC SCHOOLS.

1. *Union of School Sections — Powers of Arbitrators — Appeal to County Council—1 Edw. VII. ch. 39, sec. 42 (O.)—Costs.*] — An application was made to a township council to alter the boundaries of three school sections; and was refused; an appeal was taken to the county council against such refusal; and arbitrators were appointed by the latter council under the authority of sec. 42 (3) of the Public Schools Act, 1 Edw. VII., ch. 39 (O.). The arbitrators made no alteration in the boundaries of any of the sections, but by their award assumed to unite two of the sections, and recommended the building of a new school house in a central position in the thus united sections :—

*Held*, that it was not within the power of the arbitrators to unite the two school sections upon an appeal against a refusal to comply with an application to alter boundaries only. The arbitrators are given power “to form, divide, unite or alter the boundaries:” but that means to form, divide, unite, or alter in accordance with the subject-matter of the appeal. Award set aside without costs. *Re Southwold School Sections*, 81.

2. *Separated Town Within County—County Model School Situated in — Liability of County.*]—The town of Toronto Junction, territorially within the limits of the county of York, but a separate town.

within the provisions of the Municipal Act, and as a municipality not under the jurisdiction of the county council, is yet part of the county, within the meaning of secs. 83 and 84 of the Public Schools Act, 1 Edw. VII. ch. 39 (O.); and the county is bound to contribute to the support of a county model school situated in the town. *Toronto Junction Public School Board v. County of York*, 416.

### QUO WARRANTO.

*Notice of Motion—Time—Wrong Day of Week.*]—See MUNICIPAL CORPORATIONS, 3.

### RAILWAY.

1. *Negligence—Opportunity to Alight.*]—A railway company which has undertaken to carry a passenger to a station on its line must stop its train at that station long enough to give the passenger a reasonable opportunity of getting off. If the train stops and the passenger, after making reasonable efforts to do so, is unable to get off before it starts again, and jumps off and is injured, the company is liable in damages; provided, however, that when the passenger jumps off the train is not moving at such a rate of speed as to make the danger of jumping obvious to a person of reasonable intelligence. *Keith v. Ottawa and New York Railway Company*, 265.

2. *Statutory Obligation—Enforcement by Municipality—Prohibition against Removal of “Workshops” — Breach—Damages—Amendment.*]—Upon a motion made by the plaintiffs, pursuant to leave given in the judgment reported in 1 O.L.R. 480, for leave to amend by claiming a remedy against the defendants by virtue of the prohibition contained in sec. 37 of 45 Vict. ch. 67 (O.), providing that “the workshops now existing at the town of Whitby, on the Whitby section, shall not be removed by the consolidated company (the Midland Railway Company of Canada) without the consent of the council of the corporation of the said town:”—

*Held*, that this section imposed an obligation upon the Midland Railway Company of Canada for the benefit of the plaintiffs, who were entitled to maintain an action thereon in their own name; and by virtue of 56 Vict. ch. 47 (D.), amalgamating the Midland Company with the defendants, and cl. 3 of the agreement in the schedule to that Act, the plaintiffs could maintain an action against the defendants for damages for any breach of the obligation committed by the Midland Railway Company before, or by the defendants since, the amalgamation; and the plaintiffs should be allowed to amend and to have judgment for such damages as they were entitled to.

*Held*, also, that “the workshops now existing” meant the



buildings used as workshops; and damages could not be assessed on the basis of the prohibition being against the shutting down of or reducing the extent of the work carried on in the workshops. *Town of Whitby v. Grand Trunk R.W. Co.*, 536.

See WAY, 2.

## RATIFICATION.

See INFANT.

## REAL PROPERTY LIMITATION ACT.

See LIMITATION OF ACTIONS.

## RECOGNIZANCE.

See CRIMINAL LAW, 3.

## REDEMPTION OF ANNUITIES OUT OF ESTATE.

See TRUSTS AND TRUSTEES, 1.

## RES JUDICATA.

See COMPANY, 2.

## REVENUE.

*Succession Duty—Legacy—Payment of Legacy Within a Year—Set-off.*]—A direction in a will to executors to pay debts, funeral and testamentary expenses does not operate so as to make succession duty payable under R.S.O. 1897, ch. 24, a charge on the residue and to

exonerate the legacies from payment thereof.

*Manning v. Robinson* (1898), 29 O.R. 483, followed.

The rule that executors are not bound to pay pecuniary legacies before the expiration of a year from the testator's death does not prevent them, where no time is fixed for payment, and there is sufficient to pay debts, legacies and charges, from paying a legacy forthwith, and in this case they were held entitled to allow the amount of a legacy to be set off against a mortgage due by the legatee to the estate, the mortgage giving the privilege of payment wholly or partially at any time. *Re Holland*, 406.

## RIGHT OF WAY.

See MORTGAGE, 3.

## RULES.

Con. Rule 3.]—See LIEN, 4.

Con. Rules 120, 128, 162 (g), 164.]—See PRACTICE, 1. See also WRIT OF SUMMONS, 4.

Con. Rules 162 (e).]—See WRIT OF SUMMONS, 1.

Con Rule 185]—See PARTIES, 3.

Con. Rules 185, 186, 187, 192.]—See PARTIES, 2.

Con. Rules 194, 195.]—See EXECUTORS AND ADMINISTRATORS, 1.

Con. Rule 200.]—See PARTIES, 1.

Con. Rules 209, 353.]—See PRACTICE, 3.

Con. Rule 259.]—*See* PARTIES, 3.

Con. Rule 312.]—*See* PLEADING, 1.

Con. Rule 343.]—*See* DIVISION COURTS, 1.

Con. Rule 423.]—*See* PLEADING, 1.

Con. Rule 616.]—*See* ALIMONY.

Con. Rule 903.]—*See* JUDGMENT DEBTOR.

Con. Rule 938.]—*See* TRUSTS AND TRUSTEES, 1.

Con. Rules 1198 (b), 1199.]—*See* COSTS, 3.

### SALE OF GOODS.

*Future Delivery — Destruction before Measurement—Property Passing.*]—Whether the property in goods contracted to be sold has or has not passed to the purchaser depends in each case upon the intention of the parties, and the property may pass even though the goods have not been measured and the price has not been ascertained.

The property in the cordwood in question in this case was held to have passed to the purchaser before measurement, although owing to the destruction of the wood by fire the price could not be ascertained with precision.

Judgment of a Divisional Court, 1 O.L.R. 107, affirmed. *Wilson v. Shaver*, 110.

### SEATS.

*See* CHURCH.

### SECURITY FOR COSTS.

*See* COSTS.

### SEPARATE CAUSES OF ACTION.

*See* PARTIES, 2.

### SERVICE OUT OF JURISDICTION.

*See* WRIT OF SUMMONS, 1, 2.

### SERVICE OF NOTICE OF SALE.

*See* VENDOR AND PURCHASER, 2.

### SHARES.

*Subscription for — Contemporary Condition — Allotment — Notice — Liability as Contributory.*]—*See* COMPANY, 3.

### SINGLE JUDGE.

*See* BAIL.

### SLANDER.

*See* DEFAMATION.

### SOLICITOR.

1. *Taxation — Allowance of Lump Sum — Work done out of Court — Power of Taxing Officer.*]—A solicitor employed to collect claims aggregating \$82,000 from eleven different insurance companies, of which payment was resisted on the ground that they were gambling policies, while the widow of the

insured set up a trust for herself and her family, subject only to a lien for premiums paid and interest, after long negotiations collected from nine of the companies in all \$70,000 without suit, and also compromised the widow's claim leaving \$60,000 to his client, who by another solicitor then took legal proceedings on the remaining policies which were unsuccessful. The former solicitor rendered a bill showing in detail the negotiations and charging disbursements and ordinary costs in connection with an action by the widow and for drawing claim papers and affidavits, and a further lump sum to cover the negotiations out of Court. The client obtained an *ex parte* order referring the bill to taxation, and the taxing officer allowed \$3,200 in respect to the lump sum charged having first with the acquiescence of the parties conferred with various referees, officers and members of the profession as to charges usually made in such matters and then determined the amount to be allowed in the light of his own general knowledge and experience:—

*Held*, that the ruling of the taxing officer should be affirmed; and that after himself issuing the order for taxation the client could not claim to have the solicitor's remuneration assessed in an action. *In re Attorneys* (1876), 26 C.P. 495, followed. *Re R. L. Johnston, a solicitor*, 1.

*See* DISCOVERY, 1.—PARTIES 1.

## SOLICITOR AND CLIENT.

*Privilege — Confidential Communications — Production of Documents.*]—*See* DISCOVERY, 4.

## SPECIAL CIRCUMSTANCES.

*See* APPEAL, 2.

## STATEMENT OF CLAIM.

*See* PLEADING, 2.

## STATUTE OF FRAUDS.

*Contract — Master and Servant — Employment for an Indefinite Term — Damages.*—*See* CONTRACT, 2.

## STATUTES.

29 Car. 11, ch. 3 (Statute of Frauds), sec. 4.....

*See* CONTRACT, 2.

25 & 26 Vict. ch. 68 (Imp.).....

*See* COPYRIGHT.

B. N. A. Act, sec. 96.....

*See* CONSTITUTIONAL LAW.

45 Vict. ch. 67, sec. 37 (O.).....

*See* RAILWAY, 2.

47 Vict. ch. 88 (O.) (Union of Methodist Churches Act).....

*See* CHURCH.

47 Vict. ch. 146 (D.).....

*See* CHURCH.

R.S.C. ch. 8 (Dominion Elections Act 1900), secs. 19, 131, 133 and 142....

*See* PLEADING, 1.

R.S.C. 1886 ch. 124 (Insurance Act), sec. 13.....

*See* WRIT OF SUMMONS, 3.

R.S.C. 1886 ch. 127 (Usury Act), sec. 3.

*See* MORTGAGE, 2.

- 51 Vict. ch. 29 (D.) (Railway Act).....  
*See* ARBITRATION AND AWARD, 2.
- 51 Vict. ch. 29 (Railway Act), secs. 11  
 and 90 (D.) .....  
*See* WAY, 2.
- 55 & 56 Vict. ch. 29 (Criminal Code),  
 sec. 305 (D.) .....  
*See* CRIMINAL LAW, 1.
- 55 & 56 Vict. ch. 29 (Criminal Code),  
 secs. 197, 204 (D.) .....  
*See* CRIMINAL LAW, 6.
- 55 & 56 Vict. ch. 29 (Criminal Code),  
 sec. 284 (D.) .....  
*See* EXTRADITION.
- 55 & 56 Vict. ch. 29 (Criminal Code),  
 secs. 530, 601 (D.) .....  
*See* CRIMINAL LAW, 3.
- 55 & 56 Vict. ch. 29 (Criminal Code),  
 secs. 711, 783, 785 (D.) .....  
*See* CRIMINAL LAW, 2.
- 55 & 56 Vict. ch. 29 (CRIMINAL CODE),  
 sec. 841 (D.) .....  
*See* CRIMINAL LAW, 7.
- 55 & 56 Vict. ch. 29 (Criminal Code),  
 secs. 21, 975, 976, 980 (D.) .....  
*See* MALICIOUS PROCEDURE.
- 56 Vict. ch. 47 (D.) .....  
*See* RAILWAY, 2.
- R.S.O. 1887 ch. 152 (Municipal Act),  
 sec. 39 .....  
*See* SURVEY.
- R.S.O. 1887 ch. 164 (Gas and Water  
 Companies Act), sec. 99 .....  
*See* COMPANY, 4.
- R.S.O. 1887 ch. 169 (Building Societies  
 Act) .....  
*See* MORTGAGE, 2.
- R.S.O. 1897 ch. 7 (Ontario Voters'  
 Lists Act), secs. 6, 32 .....  
*See* PARLIAMENT.
- R.S.O. 1897 ch. 8 (Manhood Suffrage  
 Registration Act), sec. 4 .....  
*See* PARLIAMENT.
- R.S.O. 1897 ch. 24 (Succession Duty  
 Act) .....  
*See* REVENUE.
- R.S.O. 1897 ch. 36 (Mines Act) .....  
*See* MASTER AND SERVANT, 1.
- R.S.O. 1897 ch. 51 (Judicature Act)  
 sec. 54 .....  
*See* BAIL.
- R.S.O. 1897 c. 55 (County Courts Act)  
 sec. 51, sub-secs. 1, 2, 3 and 5 .....  
*See* APPEAL, 1.
- R.S.O. 1897 ch. 59 (Surrogate Courts  
 Act) sec. 41 .....  
*See* EXECUTORS AND ADMINISTRA-  
 TORS, 2.
- R.S.O. 1897 ch. 60 (Division Courts  
 Act) sec. 79 .....  
*See* PROHIBITION, 1.
- R.S.O. 1897 ch. 62 (Arbitration Act)  
 sec. 8 .....  
*See* ARBITRATION AND AWARD, 1.
- R.S.O. 1897 ch. 62 (Arbitration Act),  
 sec. 9 .....  
*See* ARBITRATION AND AWARD, 2.
- R.S.O. 1897 ch. 78 (Creditors' Relief  
 Act) .....  
*See* EXECUTION, 1.
- R.S.O. 1897 ch. 88 (Justices of the  
 Peace Protection) sec. 6 .....  
*See* DIVISIONAL COURT.
- R.S.O. 1897 ch. 88 (Justices of the  
 Peace Protection) sec. 1 (2), 13 and  
 14 .....  
*See* MALICIOUS PROCEDURE.
- R.S.O. 1897 ch. 89 .....  
*See* COSTS, 2.
- R.S.O. 1897 ch. 90 (Ontario Summary  
 Convictions Act) sec. 2 .....  
*See* CRIMINAL LAW, 7.
- R.S.O. ch. 127 (Devolution of Estates  
 Act) .....  
*See* VENDORS AND PURCHASERS, 2.
- R.S.O. 1897 ch. 129 (Trustee Act) sec.  
 11 .....  
*See* EXECUTORS AND ADMINISTRATORS, 1.
- R.S.O. 1897 ch. 129 (Trustee Act) secs.  
 18 and 19 .....  
*See* VENDOR AND PURCHASER, 3.
- R.S.O. 1897 ch. 129 (Trustee Act) sec. 53  
*See* TRUSTS AND TRUSTEES, 2.



R.S.O. 1897 ch. 133 (Real Property Limitation Act).....  
*See* LIMITATION OF ACTIONS.

R.S.O. ch. 147 (Assignments Act).....  
*See* BANKRUPTCY AND INSOLVENCY, 2.

R.S.O. 1897 ch. 153 (Mechanics' and Wage-Earners' Lien Act) sec. 31....  
*See* LIEN, 1.

R.S.O. 1897 ch. 157 (Master and Servant Act) sec. 5.....  
*See* CONTRACT 2.

R.S.O. 1897 ch. 191 (Ontario Companies Act) sec. 9.....  
*See* COMPANY.

R.S.O. 1897 ch. 203 (Insurance Act) sec. 2, sub-sec. 36, sec. 159.....  
*See* WILL, 2.

R.S.O. ch. 203 (Insurance Act), sec. 66.  
*See* WRIT OF SUMMONS, 3.

R.S.O. 1897 ch. 205 (Loan Companies Act) sec. 21.....  
*See* MORTGAGE, 2.

R.S.O. 1897 ch. 205 (Loan Companies Act) sec. 53.....  
*See* TRUSTS AND TRUSTEES, 3.

R.S.O. 1897 ch. 223 (Municipal Act), secs. 220, 221.....  
*See* MUNICIPAL CORPORATIONS, 3.

R.S.O. 1897 ch. 223 (Municipal Act), sec. 591.....  
*See* MUNICIPAL CORPORATIONS, 2.

R.S.O. 1897 ch. 224 (Assessment Act), sec. 88, sub-secs 1 and 7.....  
*See* ASSESSMENT AND TAXES, 1.

R.S.O. 1897 ch. 224 (Assessment Act), sec. 224.....  
*See* MUNICIPAL CORPORATIONS, 1.

R.S.O. 1897 ch. 245 (Liquor License Act), sec. 37.....  
*See* EXECUTION, 2.

56 Vict. ch. 31 (D.) (Canada Evidence Act).....  
*See* CRIMINAL LAW, 5.

61 Vict. ch. 53, and 1 Edw. VII. c. 36 (Canada Evidence Act Amendment).....  
*See* CRIMINAL LAW, 5.

62 Vict. (2) ch. 15 (Trustee Act), sec. 1 (O.).....  
*See* TRUSTS AND TRUSTEES, 4.

63 Vict. ch. 33 (Municipal Amendment Act 1900), sec. 9 (O.).....  
*See* MUNICIPAL CORPORATIONS, 2.

63 Vict. ch. 103 (Toronto Junction Act), sec. 11 (O.).....  
*See* ASSESSMENT AND TAXES, 2.

1 Edw. VII. ch. 26 (Municipal Act R.S.O. 1897 ch. 223 Amendment Act), sec. 9 (O.).....  
*See* CRIMINAL LAW, 4.

1 Edw. VII. ch. 29 sec. 2 (O.).....  
*See* ASSESSMENT AND TAXES, 3.

1 Edw. VII. ch. 39 (Public Schools Act), sec. 42 (3) (O.).....  
*See* PUBLIC SCHOOLS, 1.

1 Edw. VII. ch. 39 (Public Schools Act), secs. 83 and 84 (O.).....  
*See* PUBLIC SCHOOLS, 2.

## SUCCESSION DUTY.

*Legacy.*—*See* REVENUE.

## SUMMARY JUDGMENT.

*See* ALIMONY.

## SUMMARY TRIAL.

*See* CRIMINAL LAW, 2.

## SUPREME COURT OF CANADA

*See* PRACTICE, 5.

## SURROGATE COURTS.

1. *Administration—Order of Application for, in more than one Surrogate Court.*—When application for letters of administration to the estate of a deceased person are made in more than

one surrogate court preference will be given to that made by the party nearest in the order in which administration is usually granted, and jurisdiction to proceed was conferred on the surrogate court in which application was made by a mother's next-of-kin against that on behalf of creditors, in another county. *Re Tougher*, 144.

2. *Grant of Administration—Nominee of Next of Kin in Ontario—Discretion—Revocation.*—The practice of the Surrogate Courts in this Province is to apply the provisions of sec. 59 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, more liberally than do the English Courts the corresponding provision of the English Probate Act.

EXECUTORS AND ADMINISTRATORS, 2.

See APPEAL, 3.

## SURVEY.

*Village Lots—Authorization—R.S.O. 1887, ch. 152, sec. 39—Statutory Requirements—Order in Council—Resolutions of Municipal Council—By-law—Cost of Survey—Assessment for—Proprietors Interested.*—The council of an incorporated village, upon its own motion, passed a resolution "that the council do writeto the Lieutenant-Governor and council to send a surveyor to finally settle disputes in regard to Port Carling streets." The clerk of the council thereupon wrote a letter, addressed to the

Lieutenant-Governor in Council, stating that there had been great dissatisfaction with regard to the surveyor's lines of the village lots known as "the Bailey estate," composed of about 114 lots; that the lines had been run more than once since the original survey, and each time had been altered; that the village council had been applied to repeatedly to have the work done by an experienced surveyor appointed by "your honourable council," under sec. 39 of R.S.O. 1887, ch. 152, and to have the boundaries of the lots ascertained and marked; and asking the council to "decide in favour of this." In answer the assistant commissioner of crown lands wrote as follows: "Referring to yours . . . asking that certain streets on which are about 114 lots known as 'the Bailey estate' be re-surveyed, owing to the original survey having become obliterated, . . . you understand the survey will have to be at the cost of the municipality, and the survey will consist, under R.S.O. 1887, ch. 152, sec. 39, of planting posts at the angles of the lots on Bailey street, Joseph street, . . . and a street . . . which, it appears, has no name. These are the streets on which the Bailey lots front, and I presume that a post planted at the front angles of these lots would be all that the municipality would require. . . Let us know at once, and . . . give us the name of the surveyor to whom you wish instructions to issue." Thereafter a resolution was passed by the village

council "that the clerk be instructed to order a surveyor to locate the streets of the village at once." The clerk then wrote to the commissioner of crown lands that the council had decided to employ C., a land surveyor, "to run the lines on certain streets and lots on the Bailey estate. An order in council was passed by which C. was instructed to survey the village lots of the Bailey estate and to plant durable monuments at the front angles of each of these lots, on Joseph street; Bailey street, and a street south of Bailey street, unnamed in the original survey, and he did as he was instructed. The village council then passed a by-law directing that the sum of \$290.77, being the cost of the survey, should be levied on the proprietors of the lands surveyed, being the village lots of the Bailey estate:—

*Held*, that the survey directed was not authorized and was illegal, the requirements of the statute (R.S.O. 1887, ch. 152, sec. 39), not having been complied with so as to give the Lieutenant-Governor in council jurisdiction to authorize the survey.

2. That the survey being illegal, the municipal council had no power to pass a by-law to levy the cost of it.

3. That if there was jurisdiction to authorize the survey, it could only be at the cost of the proprietors of the lands in each range or block interested, and not of all the proprietors, whether interested or not.

*In re Scott and County of Peterborough* (1866), 26 U.C.R. 36, followed.

*Regina v. McGregor* (1868), 19 C.P. 69, distinguished. *Sutton et al. v. Village of Port Carling et al.*, 445.

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### **SURVIVAL OF ACTION.**

*See* EXECUTORS AND ADMINISTRATORS, 1.

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### **TAXATION.**

*See* SOLICITOR, 1.

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### **TELEPHONE COMPANY.**

*Right to Carry Poles and Wires along and across Streets —Consent of Municipalities.*  
—*See* CONSTITUTIONAL LAW.

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### **TENANCY AT WILL.**

*See* LIMITATION OF ACTIONS.

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### **TENDER.**

*See* MORTGAGE, 1.

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### **THEFT.**

*See* CRIMINAL LAW, 1.

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### **THIRD PARTY NOTICE.**

*See* PARTIES, 2—PRACTICE, 3.

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### **TIME.**

*See* ASSESSMENT AND TAXES, 1—BANKRUPTCY AND INSOLVENCY, 3—DIVISION COURTS, 1.

**TORT.**

See EXECUTORS AND ADMINISTRATORS, 1.

**TRADE-MARK.**

*Assignment — Execution.*]

The right of property in a registered specific trade-mark is not saleable by itself under a writ of execution. Such a right can be sold, if at all, only as appurtenant to the business in which the trade-mark has been used. *Gegg v. Bassett*, 263.

**TRANSFER BY INSOLVENT DEBTOR.**

See BANKRUPTCY AND INSOLVENCY, 3.

**TRESPASS.**

See DAMAGES.

**TRIAL.**

1. *Libel — Jury Notice — Necessity for.*]

In actions of libel it is not necessary to file and serve a jury notice. *Puterbaugh v. The Gold Medal Manufacturing Company*, 259.

2. *Notice of Trial — Service of — Letter Wrongly Addressed — Ratification.*]

On the day prior to the last day for serving notice of trial, the plaintiff's solicitor, who lived in a county town, drew up a notice of trial, and copies of same, which he directed to be forwarded to his Toronto agent, with instructions

to serve and return with admission of service; but by a mistake in the office, the envelope was addressed to the defendants' solicitors in Toronto, and reached their office on the following morning, but did not come to the notice of the member of the firm who had charge of the defence therein, until after four o'clock, when on discovering that the letter was not addressed to his firm, he returned it with the notices to his St. Thomas agents, with instructions to return it to the plaintiff's solicitors, which was done:—

*Held*, that what was done did not constitute valid service of the notices on the defendants' solicitors; nor had the defendants' solicitors done anything to ratify such service. *Newsom v. The Mutual Reserve Life Insurance Company and two other cases*, 253.

**TRUSTS AND TRUSTEES.**

1. *Will — Annuities — Setting apart Securities — Distribution of Residue — Realization of Estate — Investments — Redemption of Annuities out of Estate — Consent.*]

An order made under Rule 938 declared that the persons interested in the residue of the estate of a testator were entitled to have sums set apart by the executors and trustees, from time to time, from the capital of the estate, to provide for annuities bequeathed by the testator, as sufficient funds for that purpose came to



the hands of the executors, or to have such sums applied by them in the purchase of Government annuities, and, after provision made for the payment of the specific legacies and the annuities, to have the residue in the hands of the executors from time to time distributed among the persons entitled. The order also provided that, in the event of differences as to matters arising under the foregoing declaration, a local Master should determine such differences and give necessary directions :—

*Held*, that the order was substantially right. The annuitants were not entitled to have the estate of the testator realized and converted into money further than might be necessary for the payment of his debts and funeral and testamentary expenses; their right was limited, after this had been done, to having the annuities sufficiently secured by the setting apart of such part of the estate as might be adequate for that purpose; and, there being in the hands of the executors and trustees proper trust securities amply sufficient to secure all the annuities and to leave a surplus presently available for distribution among the persons entitled to the residue, there was no necessity to convert these securities into money; and it would suffice to set apart securities for such an amount as, calculating the interest to be derived from it at the rate of four per cent. per annum, would produce a yearly

sum equal to the amount of the annuities to be provided for.

*In re Parry* (1889), 42 Ch. D. 570, and *Harbin v. Masterman*, [1896] 1 Ch. 351, followed.

*Held*, also, that these matters could properly be determined and an inquiry directed upon an originating notice under Rule 938 brought on by one of the persons entitled to the residue.

*In re Medland, Eland v. Medland* (1889), 41 Ch. D. 476, at p. 492, and *In re Parry, supra*, followed.

The order also directed that, in the event of the parties agreeing or the Master directing that any sum be expended on the purchase of Government annuities, the annuitant might elect to receive such sum in discharge of his annuity, and that the sum should, on the execution of a proper discharge, be paid to the annuitant :—

*Held*, that it is only when the persons whose estate is liable to pay an annuity, in this case those entitled to the residue, and the annuitant, both consent, that an annuity may be redeemed out of the estate; and the order should be varied so as to require that consent. *Re McIntyre—McIntyre v. London and Western Trusts Co.*, 212.

2. *New Trustee — Appointment of—Married Woman.*—Under the Trustee Act, R.S.O. 1897, ch. 129, a married woman was appointed a trustee to fill a vacancy under the circumstances set out in the report. *Re Eliza Gough Estate*, 206.

3. *Shares in Building Society — Mortgage of Shares held "in Trust" — Purchaser of Land Subject to Mortgage Collateral to Loan on Shares without Notice that Shares Pledged for Prior Loan — Consolidation — Purchaser of Trust Shares.*]

— The defendant mortgagor being the holder of six shares of class "A" permanent stock in her own name, and six shares of class "C" instalment stock "in trust," and other shares of class "B" stock in a building society, obtained a loan of \$700 from the plaintiff's company and transferred to their treasurer, as security, "all my stock in the said company, consisting of shares of classes A, B, and C stock, held by me in the said company," and "all other stock or shares held by me in the said company."

Subsequently she obtained a further loan of \$600, and transferred to the treasurer, as security, six shares of class C instalment stock, the intention being to transfer the six shares held "in trust" and already assigned, as the plaintiffs contended to secure the prior loan of \$700, giving also a mortgage on land reciting that she was the owner of six shares of the capital stock of the plaintiffs' company, and that the plaintiffs had agreed to advance \$600 upon the said shares, with such mortgage as further security.

The mortgagor afterwards conveyed the lands to a purchaser, subject to the \$600 mortgage, who assumed the

mortgage, and also purchased from the mortgagor her equity on the six shares of instalment stock so held "in trust," subject also to the \$600 mortgage.

In an action by the plaintiffs claiming consolidation of the loans and payment of both mortgages or foreclosure:—

*Held*, that the use of the words "in trust" put the plaintiffs upon inquiry, and they were affected by the notice that the mortgagor was not the owner of the shares and had no power to mortgage:—

*Held* also, that sec. 53 of ch. 205 R.S.O. 1897, which relieves a company from seeing to the execution of any trust to which shares are subject, did not empower the plaintiffs to disregard the trusts.

The purchaser brought into court the arrears due on the collateral mortgage, and the plaintiffs accepted the amount in satisfaction of such arrears:—

*Held*, that the plaintiffs could not consolidate the two mortgages as against the purchaser, as she was a purchaser for value without it being shewn that she was aware, at the time she bought the equity of redemption in the lands, that any prior mortgage existed against the six shares in the hands of the plaintiffs.

Judgment of MacMahon, J., reversed. *The Birkbeck Loan Co. v Johnston et al.*, 497.

4. *Liability for Breach of Trust by Co-trustee*—"Honestly and Reasonably"—62 Vict. (2)

*ch. 15, sec. 1 (O.).*—A testator devised his estate to his three executors upon trust. One of the executors was a solicitor, and with regard to him the will provided that in the administration and management of the estate he should be entitled to the same professional remuneration as if he were not trustee. Another executor was in England, and the third, the defendant, was told by the testator that the solicitor-trustee was to have the management of the estate, and consented to act upon that understanding. All three proved the will and acted as trustees, but the whole management of the estate was left to the solicitor, and at his death it was found that he had, without the knowledge of the defendant, misappropriated money of the estate, and that his own estate was insolvent. The testator had perfect confidence in the solicitor, who up to the time of his death was reputed to be a person of integrity, and wealthy:—

*Held*, that the defendant having acted honestly and reasonably within the meaning of 62 Vict. (2) ch. 15, sec. 1 (O.), was not liable to make good to the estate the loss occasioned by the misconduct of the solicitor.

Decision of Ferguson, J., affirmed. *Dover et al. v. Denne et al.*, 664.

See CHURCH.

## VALUATION OF PROPERTY.

See ASSESSMENT AND TAXES, 3.

## VENDOR AND PURCHASER.

1. *Sale under Direction of the Court—Error in Fixing Reserve Bid—Opening Biddings.*—A purchaser at a sale under the direction of the Court having no knowledge of an irregularity in fixing the reserve bid cannot be affected thereby, and a motion made to set aside a sale and open the biddings on the ground that in fixing the reserve bid the value of one part of the property was not taken into consideration was dismissed with costs.

The referee not having in his report approved of the sale but having made a special report regarding it, the purchaser although ready was unable to pay the balance of his purchase money into Court:—

*Held*, that he should be allowed to pay it in without interest and without prejudice to his right to object to the title. —*Re Jelly, The Provincial Trusts Co. v. Gamon*, 72.

2. *Mortgage—Notice of Sale—Service of—Recital in Deed—"Assigns"—Devolution of Estates Act—Caution—Non-registration of—Service of Notice of Sale on Infant Heir.*—By a provision in a mortgage of realty no want of notice required by the mortgage was to invalidate any sale thereunder, but the vendor was alone to be responsible. The conveyance made on a sale under the power of sale in the mortgage contained a recital that service of the notice had been duly made on the

mortgagor and his wife, who had joined to bar her dower, and there was no evidence of the untruth of such recital and the purchaser's knowledge of its untruth:—

*Held*, that a subsequent vendor of the land in making title on a sale thereof could not be called on to furnish any other evidence of such service.

*Held*, also, that the objection being as to proof of service on the wife no such evidence was in any event required, for by the terms of the power of sale in the mortgage which was made in pursuance of the Short Form Act service was to be made on the mortgagor, his heirs or assigns, and the wife was not an "assign" within the meaning of the power.

After the coming into force of the Devolution of Estates Act and after the expiration of a year from the death of the mortgagor a married woman, no caution having been registered, sale proceedings under the power were taken on the mortgage:—

*Held*, that service of notice of sale on the husband and the heirs of the mortgagor, two infant daughters, was sufficient, it not being necessary under such circumstances to serve the personal representatives. *Re Martin and Merritt*, 284.

3. *Vendors and Purchasers Act—Will—Debts Charged on Lands—Executor's Power to Sell*, R.S.O. 1897, ch. 129, secs. 18 and 19—*Dower—Evidence of*

*Election*.—A testator by his will directed his executors to pay his debts and subject to the payment of them devised a particular portion of his estate and directed that the balance of such portion after payment of the debts should be divided amongst his four children in equal shares. Then followed a paragraph that the property devised should go to the devisees direct:—

*Held*, that a power of sale was given to the executors under the provisions of sec. 18 of ch. 129 R.S.O. 1897, and that purchasers were by sec. 19 released from the necessity of enquiring as to the due execution of the power.

The will also contained gifts to the widow including an annuity to be accepted in lieu of dower, which was regularly paid to her, and which she apparently had elected to accept in lieu of dower:—

*Held*, that the purchaser was entitled either to a release from her or to a declaration from her in form sufficient to estop her as against him from claiming dower. *Re Bradburn and Turner*, 351.

4. *Possession by Purchaser under Contract—Waiver—Improvements*.]—Where a purchaser of real estate by the terms of the contract entitled to a perfect title, upon payment of the deposit entered into and continued in possession as provided by the contract, and made improvements even after alleged



defects in the title were brought to his attention and after he had brought an action for specific performance, the vendor asserting that he had a good title:

*Held*, that the purchaser had not waived his right to a good title.

In the absence of fraud on the part of the vendor, or other special circumstances, if a purchaser takes possession under the contract and the vendor is unable to make a good title, the purchaser is not entitled to be repaid the amount expended by him in improvements.

Judgment of MacMahon, J., reversed in part. *Rankin v. Sterling*, 646.

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### VENDOR'S LIEN.

*Timber—Cut and Uncut—Interest in Land—Identification.*]—See LIEN, 5.

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### VOTERS' LISTS.

See PARLIAMENT.

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### WAIVER.

*Of Right to Good Title—Possession by Purchaser under Contract—Improvements.*]—See VENDOR AND PURCHASER, 4. MORTGAGE, 1.

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### WARRANT OF COMMITMENT.

See CRIMINAL LAW, 2.

### WAY.

1. *Highway—Sidewalk thereon built by Voluntary Subscription and Statute Labour—Liability of Municipality to Repair.*]—A township municipality was held liable in damages for an injury arising through the non-repair of a sidewalk on a highway within its limits, notwithstanding the fact that the sidewalk was built by voluntary subscription and statute labour, and although the municipality never assumed any control over it nor was any public money or statute labour expended on it with the knowledge of the council, where the latter was aware of the existence of the sidewalk and there has been opportunity and time to repair it. *Madill v. The Corporation of the Township of Caledon*, 66; affirmed on appeal 555.

2. *Road Allowance—Obstruction—Railways—Fences—Municipal Corporation—By-law—Railway Act of Canada—Railway Committee of Privy Council—Injunction—Removal of Obstruction—Jurisdiction.*]—An action for an injunction to restrain the defendants from obstructing a highway in the township, by fences on both sides of the defendants' tracks where they crossed the highway, and for a mandatory order compelling the removal of the fences:—

*Held*, that the allowance for the road in question, having been made by a Crown sur-

veyor, was a highway within the meaning of sec. 599 of the Municipal Act, and, although not an open public road, used and travelled upon by the public, it was a highway within the meaning of the Railway Act of Canada, 51 Vict. ch. 29.

2. That, although the road allowance had not been cleared and opened up for public travel and had not been used as a public road, it was not necessary for the municipality to pass a by-law opening it before exercising jurisdiction over it; the council might direct their officers to open the road, and such direction would be sufficient.

3. That the right of the railway company under sec. 90 (*g*) of the Railway Act to construct their tracks and build their fences across the highway was subject to sec. 183, which provides against any obstruction to the highway, and sec. 194, which provides for fences and cattle-guards being erected and maintained; and, therefore, the defendants had no right to maintain fences which obstructed the highway or interfered with the public user or with the control over it claimed by the municipality.

4. That the Railway Committee of the Privy Council had no jurisdiction to determine the questions in dispute; sec. 11 (*h*) and (*g*) of the Railway Act not applying.

5. That the Court had jurisdiction to grant the relief sought.

*Fenelon Falls v. Victoria Railway Co.* (1881), 29 Gr. 4, and *City of Toronto v. Lorsch* (1893), 24 O.R. 227, followed.

6. That the highway being vested in the township corporation, who desired to open and make it fit for public travel, the plaintiffs were entitled to have the defendants enjoined from obstructing it and ordered to remove the fences. *Township of Gloucester v. Canada Atlantic R. W. Co.* 85.

3. *Injury to Pedestrian—Defect in Carriageway—Liability of Municipality—Findings of Trial Judge.*—The plaintiff, in crossing at night on foot a busy street in a city, did so at a point thirty feet distant from the crossing, proceeding in a diagonal direction across the carriageway. There was a hole or depression in the asphalt pavement from  $1\frac{1}{2}$  to  $1\frac{7}{8}$  inches deep at its deepest part, and the plaintiff slipped upon the edge and was injured. In an action against the city corporation for damages for negligence, the trial Judge found that the accident was caused by the defendants' negligence in allowing the pavement to be and remain dangerously out of repair; that the plaintiff was not guilty of contributory negligence in crossing the street diagonally; that the street was not sufficiently out of repair to be dangerous to horses or vehicles; and assessed damages to the plaintiff:—

*Held*, FALCONBRIDGE, C.J., dissenting, that the plaintiff,

using the carriageway when on foot, had no right to expect a higher degree of repair than would render the way reasonably safe for vehicles; and the last finding of the Judge put the plaintiff out of court.

*Boss v. Litton* (1832), 5 C.&P. 407, explained and distinguished.

*Semble*, per STREET, J., that the defect in question was not one from which a reasonable man would have apprehended danger to any person either on foot or in a carriage, and therefore the corporation could not be guilty of negligence in regard to it.

Per FALCONBRIDGE, C.J., that the judgment ought to be upheld, as it was a question of fact, not of law, whether the depression was an actionable defect in the highway. *Belling v. City of Hamilton*, 318.

See CONSTITUTIONAL LAW.

## WILL.

1. *Provision in Case of Sickness—Executors' Discretionary Power—Personal Representatives.*—A testatrix by her will bequeathed a sum of money to her son, with a direction that her executors should invest the same and pay to him half the interest, and in case of his sickness to advance to him such portion of the principal money as they should think necessary, and in case of his death, after paying the funeral and other necessary expenses to divide the amount equally amongst her other surviving children; and

by a residuary clause, she gave the residue of her estate to her children in equal shares:—

*Held*, that in case of sickness a trust was created, which must be exercised by the executors, when called upon to do so, though they had a discretionary power to determine the amount necessary to be so applied, and that such sum was payable to the son's personal representatives.

The son was taken ill and died.

*Held*, that the trust arose, and the circumstance that the beneficiary died before the money was actually advanced or set apart did not operate to deprive his personal representatives of the right to receive it.

*Held*, also, that the son's creditors had no direct claim against the executors or the fund. *Re Evans*, 401.

2. *Construction* — “Including” — *Estate—Policies of Insurance—R.S.O. 1897, ch. 203, sec. 2, sub-sec. 36, sec. 159.*—A testator bequeathed to his wife one-half his estate “including policies of insurance made payable to her upon my death.” He left three policies on his life, one expressed to be payable to his wife, the second expressed to be “for the benefit of his wife . . . the beneficiary” and providing for payment to his wife as beneficiary, of an annuity of \$250, for twenty years, and the third payable at his death to “his legal heirs.” The widow was the legal heir:—

*Held*, that the third policy

formed part of the testator's estate, but not the first two, for by them a trust was created in favour of his wife as a preferred beneficiary, and so remained until the testator's death.

*Held*, also, that the word "including" imported addition, that is indicated something in addition to and not to be included in the half of his estate. *In the Matter of the Estate of T. W. Duncombe*, 510.

3. *Annuity — Ademption — Evidence.*]—A testator gave by his will to each of two daughters an annuity for life of \$6,000. After making the will he gave to one daughter absolutely bonds sufficient to produce an income of a little more than \$1,200 a year, and by a codicil reduced her annuity by that amount. He subsequently also gave to the other daughter absolutely bonds sufficient to produce an income of a little more than \$1,200 a year, and instructed his solicitor to alter his will so as to reduce her annuity by that amount. He died suddenly and the will was not altered:—

*Held*, that the doctrine of ademption applied and that notwithstanding the different nature of the two gifts, and even without the evidence of intention, the second daughter's annuity must be treated as reduced pro tanto.

*Held*, also, however, that the evidence of intention was admissible and was conclusive.

Judgment of Ferguson, J., 1

O.L.R. 364, affirmed. *Tuckett-Lawry v. Lamoureaux*, 577.

4. *Construction—Distribution of Estate—"Heirs"—"Next in Heirship"—Period of Ascertainment.*]—Following a gift to the testator's widow of his real and personal estate for her life, there was this clause in a will: "My whole estate (after the death of my wife) be equally divided between my brothers L.G., J.G., Mrs. C.W., and my deceased sister Mrs. S.A.H.'s children, or their heirs. Should no heirs of any of the above be alive, that it go to the next in heirship:—"

*Held*, that the persons entitled in the first place were all the children of the four persons named living at the testator's death or born afterwards during the life of the widow, *per capita*, and not *per stirpes*. The words "children or their heirs" meant "children or their issue," and gave the share of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, and not by descent from, the child so dying. The shares of the children entitled to share became vested at once; but if any child died in the lifetime of the widow leaving issue, the share of that child was divested and went to such issue, and vested at once, and finally, in the issue, who then became the stock of descent. The words "next in heirship" meant the heirs at law to the realty and the statutory next of kin to the personalty, to be



ascertained in each case at the death of the person whose share they took. *Re Gardner*, 343.

5. *Construction — Power of Advancement—Division of Estate in pursuance thereof.*]—A testatrix by her will directed her trustees to pay an annuity to each of her three children, and empowered the trustees “from time to time to make such advances as they may deem proper out of the corpus or income or both of my estate for the benefit of my said children or any one or more of them either on their marriage or as an advancement in life or for any other purpose that may appear to them wise and reasonable.” On the death of all the children of the testatrix the undisposed of residue was directed to be divided among their children then living, and in default of a grandchild living at the death of the last surviving child of the testatrix, then the undisposed of residue was to be divided among certain charities.

*Held*, that a division of a considerable portion of the estate between two of the children, made by the trustees in good faith two years after the death of the testatrix, was a valid exercise of the power.

Judgment of *Boyd, C.*, affirmed. *Hospital for Sick Children v. Chute*, 590.

See VENDOR AND PURCHASER, 3—TRUSTS AND TRUSTEES, 1.

## WORDS.

“*Exigible under Execution.*”]  
—See JUDGMENT DEBTOR.

“*Heirs*” “*Next in Heirship.*”]  
—See WILL, 4.

“*Honestly and Reasonably.*”]  
—See TRUSTS AND TRUSTEES, 4.

“*Including.*”]—See WILL, 2.

“*Industry already Established.*”]—See MUNICIPAL CORPORATIONS, 2.

“*Works, Plant, Appliances and Property.*”]—See COMPANY, 4.

“*The Workshops now Existing.*”]—See RAILWAY, 2.

## WRIT OF SUMMONS.

1. *Service out of Jurisdiction* — Rule 162 (e) — Contract — Place of Performance—Quebec Law—Discretion.]—An agreement between the plaintiff and defendants provided for the purchase by the defendants, who resided and carried on business in Montreal, in the Province of Quebec, from the plaintiff of certain plant and machinery and stock in trade of a business carried on by him at Montreal. A part of the stock in trade was not at once to be purchased, and provision was made that it was to be held by the defendants on consignment, and sold by them for and on account of the plaintiff; and that if at any time the plaintiff should be willing to sell to the defendants this part of the stock, or any portion there-

of, the defendants should purchase the same at the stock price thereof. The agreement was signed by the plaintiff in Toronto, in the Province of Ontario, and afterwards by the defendants in Montreal. The plaintiff sued for the price of the goods referred to in the latter part of the agreement, alleging that he had elected to sell the goods to the defendants, and had notified them of his willingness to do so, whereupon they became liable to pay him the price:—

*Held*, that the contract was made in Montreal, and the obligations arising out of it were to be governed by the law of Quebec, according to which the domicile of the debtor is the place of payment, and therefore the action was not founded on a breach within Ontario of a contract to be performed within Ontario, and service of the writ of summons out of Ontario should not be allowed: Rule 162 (*e*).

In another view, the obligation to pay did not arise directly from the provisions of the agreement, but in order to make it complete there must have been an election to sell, and notice thereof to the defendants, and, as a notice of the election was given by letter received by the defendants in Montreal, there was another difficulty in the way of the plaintiff.

Having regard to all the circumstances and to the fact that the defendants were not possessed of any property in Ontario which could be reached by process upon a judgment recovered in this

action, a proper discretion was exercised in setting aside the order allowing service of the writ out of Ontario.

*Comber v. Leyland*, A.C. 524, referred to. *Phillips v. Malone et al.* 47.

An appeal from this judgment to a Divisional Court was dismissed with costs.

*Per* FALCONBRIDGE, C.J.—If the agreement of May 1st, 1899, was complete, the contract was made in Quebec; but if it was to be completed by the subsequent acts of the parties, there was no authority to the plaintiff to use the post office as a means of communication.

*Per* STREET and BRITTON, JJ.—The plaintiff might have notified the defendants that he desired them to become the purchasers of the goods, but he had no right to prescribe the dates at which the defendants should pay for them. His letter was only a proposal to take the goods upon the terms proposed therein, requiring an acceptance by the defendants to make it a complete contract; the onus of shewing which was on the plaintiffs, and was not satisfied.

Judgment of Meredith, C.J., affirmed. *Phillips v. Malone*, 492.

2. *Service out of Jurisdiction—Contract—Breach of—Traveller.*—The defendant was employed by the plaintiffs, who resided and carried on business in Ontario, to act as their traveller, at an agreed remuneration, in selling and taking orders for

their goods over a prescribed route to British Columbia and return, his duties on such return requiring him to call at a number of places in Ontario; to make his report to the plaintiffs, and return his samples. After entering on the performance of the contract, and while in British Columbia, he wrote resigning his position, which the plaintiffs refused to accept, and after allowing a sufficient time to elapse for the performance of the contract, they brought an action in Ontario for the breach of the said contract:—

*Held*, by the Master in Chambers, that the plaintiffs were entitled to maintain the action.

On appeal to STREET, J., the judgment was varied by limiting the action to the breaches which occurred within Ontario, but reserving to the plaintiffs the right to bring actions for the breaches out of Ontario. *Lovell v. Coles*, 291.

3. *Service on Insurance Company—Power of Attorney—Removal of Office from Province.*—An English insurance company which had carried on business in Canada, and whose head office was then at Toronto, had by two powers of attorney appointed its general agent at Toronto attorney to receive process both under R.S.O. 1897, ch. 203, sec. 66, and R.S.C. 1886, ch. 124, sec. 13. It afterwards transferred its Canadian business to another company and closed its Canadian offices, but the deposit under the Dominion

Act had not been released, and neither of the powers of attorney had been cancelled.

On a motion to set aside the service of a writ of summons which was accepted by solicitors as if served on the Toronto agent of the company, subject to the right to move against it on the ground that the company was not within the jurisdiction:

*Held*, that a writ of summons upon a policy issued in Quebec in respect of a loss upon property there was properly served upon the agent named as attorney at Toronto under Con. Rule 159, and that therefore the Court in Ontario had jurisdiction to entertain the action.

*Seemle*, that the power of attorney required to be filed under R.S.C. ch. 124, sec. 13, is to receive service of process in any suit instituted in any Province of Canada in respect of any liability incurred *in such Province*. *Armstrong et al. v. The Lancashire Fire Insurance Co.*, 395.

4. *Service out of Jurisdiction—Order before Action.*—The proper practice under the Rules as they stand (Rules of 1897 Nos. 120, 128, 164) is to obtain, before the issue of the writ of summons, an order fixing the time for appearance to be inserted in the writ proposed to be issued, and allowing it to be served out of the jurisdiction. *Re Jones v. Bissonnette et al.*, 54.

*See PLEADING*, 2.

















